DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-8974
Title: Barion Perry, Petitioner
v.
New Hampshire
Docketed: February 16, 2011
Lower Ct: Supreme Court of New Hampshire
Case Nos: (2009-0590)
Decision Date: November 18, 2010
Questions Presented:

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 11 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 18, 2011)
Mar 4 2011	Waiver of right of respondent New Hampshire to respond filed.
Mar 17 2011	DISTRIBUTED for Conference of April 1, 2011.
Mar 24 2011	Response Requested. (Due April 25, 2011)
Apr 25 2011	Brief of respondent New Hampshire in opposition filed.
Apr 29 2011	Reply of petitioner Barion Perry filed.
May 11 2011	DISTRIBUTED for Conference of May 26, 2011.
May 31 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 24 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 29, 2011.
Jul 20 2011	The time to file respondent's brief on the merits is extended to and including September 16, 2011.
Jul 29 2011	Joint appendix filed.
Jul 29 2011	Brief of petitioner Barion Perry filed.
Aug 5 2011	Brief amicus curiae of The Innocence Network filed.
Aug 5 2011	Brief amicus curiae of American Psychological Association filed.
Aug 5 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 5 2011	Brief amici curiae of Wilton Dedge, et al. filed. (Distributed)
Aug 8 2011	SET FOR ARGUMENT ON Wednesday, November 2, 2011.
Aug 10 2011	CIRCULATED.
Sep 1 2011	Record received from Supreme Court of New Hampsire.
Sep 16 2011	Brief of respondent New Hampshire filed. (Distributed)
Sep 23 2011	Brief amicus curiae of the United States filed. (Distributed)

Sep 23 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed
Sep 23 2011	Brief amici curiae of Louisiana, et al. filed. (Distributed)
Sep 23 2011	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Sep 23 2011	Brief amicus curiae of National District Attorneys Association filed. (Distributed)
Oct 17 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED
Oct 17 2011	Reply of petitioner Barion Perry filed. (Distributed)
Nov 2 2011	Argued. For petitioner: Richard Guerriero, Concord, N. H. For respondent: Michael A. Delaney, Attorney General, Concord, N. H., and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

10-8974

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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BARION PERRY
Petitioner

v.

STATE OF NEW HAMPSHIRE
Respondent

On Petition For Writ Of Certiorari
To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a witness in a criminal case identifies a suspect out-of-court, under suggestive circumstances which give rise to a substantial likelihood of later misidentification, due process requires the trial judge to determine whether the out-of-court identification and any subsequent in-court identification are reliable before either may be admitted into evidence. **Question**: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as held by the First Circuit Court of Appeal and other federal courts of appeal, or only when the suggestive circumstances were orchestrated by the police, as held by the New Hampshire Supreme Court and other courts?

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PETITION

Barion Perry respectfully petitions for a writ of certiorari to the New Hampshire Supreme Court in State v. Barion Perry, No. 2009-0590 (N.H. November 18, 2010).

OPINION BELOW

The opinion of the New Hampshire Supreme Court is provided at Appendix 1.

STATEMENT OF JURISDICTION

The New Hampshire Supreme Court issued its opinion affirming Perry's conviction on November 18, 2010. This Court has jurisdiction under the United States Constitution, Article II, Section 2, and 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In the early morning of August 15, 2008, while still dark, a Honda Civic belonging to Alex Clavijo was broken into through a rear window while parked in a lot adjacent to the apartment building in which Clavijo resided in Nashua, New Hampshire. Clavijo later reported that stereo equipment, a wrench, and a bat were removed from the car.

Two of Clavijo's neighbors from the same apartment building, Nubia Blandon and Joffre Ullon, a married couple, called the police to report suspicious activity by a black male they observed in the parking lot. Only Blandon claimed to have observed any actual criminal activity, i.e., she said that from her apartment window above the parking lot, she observed the man removing items from the rear of the car in the parking lot below. Blandon left her apartment at one point to inform Clavijo that someone had broken into his car. After police responded to the parking lot, encountered Perry, spoke with another man pointed out by Perry, and went inside to talk with Blandon, Blandon pointed, from inside her apartment, toward her window and indicated that the man standing with police in the parking lot was the man she had seen taking items from the car. Blandon never provided any substantial description of the perpetrator, could not pick Perry from a photo line-up, and did not identify Perry at trial.

Prior to trial, Perry moved to exclude Blandon's out-of-court identification and the State objected. Nashua police officer Nicole Clay was the only witness called to testify at the hearing on the motion.

Clay testified that on August 15, 2008 at approximately 2:52 a.m., she was dispatched to the parking lot of a large apartment building for a report "about a black male looking through vehicles and attempting to gain entry into vehicles." Upon her arrival, Clay heard a metallic clang that sounded like a bat hitting the ground. Clay observed Perry standing in the lot holding amplifiers.

Perry walked toward her. Clay asked Perry to put down the amplifiers and speak to her, which he did. Perry explained that he had found the amplifiers on the ground and was moving them. Clay said that Perry told her that before her arrival he had seen two individuals leaving the lot. Perry pointed out another male nearby and identified him as one of the individuals he had seen. Clay questioned this other man briefly before letting him go.

At this point, Clavijo approached Clay and identified himself as the owner of the car that had been broken into. Clavijo told Clay that he did not see anything but that his neighbor did. Clavijo and Clay went into the apartment building together to speak with Blandon.

Before going inside, Clay asked Officer Robert Dunn, who had arrived on the scene, to stand with Perry, and the two of them remained standing together in the lot. Dunn was in full uniform. Both Clay and Dunn had arrived in fully-marked police cruisers. While Perry stood with Dunn, Perry was the only black man in the area. No one else stood with Dunn.

Clay spoke with Blandon in the hallway outside her apartment, with Clavijo translating. Clay testified that the apartment was on the second or third floor. Clay could not see Perry from where she spoke with Blandon. Clay asked Blandon for a description of the man she had seen. The only description Blandon provided was that he was a tall black man. She gave no description of the man's facial features, facial hair, clothing, etc.

Blandon then told Clay that the man presently standing in the "back lot" with the police officer (Dunn) was the man she had seen previously. Clay testified that Blandon "kind of went back into her apartment and pointed towards the window to show me that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot."

Clay testified that Blandon told her that she had seen the man walking and looking in the twelve to fifteen cars in the lot before circling Clavijo's car, opening the trunk, and taking a large

item from the trunk. Clay said Blandon told her she saw the man carrying a bat. The two amplifiers Clay found Perry holding were different than the one large item Blandon said she had seen the man removing from the trunk. The large speaker box Blandon was presumed to have seen was found in a different part of the lot from where Clay encountered Perry.

Blandon did not tell Clay how she came to observe the man in the lot or how long she observed him. Clay said she did not know how long Blandon was at the window before Clay knocked on her door. Clay admitted that the man's actions as described by Blandon could have occurred in "a couple of minutes." Clay never asked and Blandon did not say if she was constantly at the window after first spotting the perpetrator. Clay never asked and Blandon did not say if she was doing other things during the time the perpetrator was in the lot. Clay never asked and Blandon did not say if she was on the phone while observing the perpetrator.

Clay never looked out Blandon's window to see Blandon's point of observation. Clay testified that the parking lot was "fairly well lit", but also said it was the middle of summer, so the trees had leaves. She said that when she went inside to speak with Blandon, Perry and Dunn were in the middle of the lot, and the lighting was "excellent." However, when she returned to the lot, Perry and Dunn were at the end of the lot about thirty feet from the building, where the lighting was "a little bit darker."

Clay testified that Blandon was later shown a photo array that included a photo of Perry. Blandon was unable to pick Perry from the array.

The State never argued that the scenario of Perry standing with Dunn in the lot was not suggestive, but only that the identification should not be excluded because the police did not act intentionally to set-up the scenario. The trial court denied the motion to exclude the identification, ruling that the identification was not the product of an unnecessarily suggestive procedure solely

because the police did not manufacture the identification.

At trial, Blandon testified that she woke up about 2:30 a.m. the morning of the incident because Ullon had to go to New York. She testified that she looked out her apartment window over a total period of "as much as half an hour." During this time, she saw a "young man" twice circle the parking lot on a bicycle looking at cars. She observed him leave, return without the bicycle, and approach the area of Clavijo's car. Although she testified that her view of the rear of Clavijo's car was "perfect", she also said that her apartment was on the fourth floor; the area she was observing was "quite a distance" away; and the view of Clavijo's car was partially blocked by another vehicle.

Blandon testified that at first, she thought the man in the parking lot was one of Clavijo's friends, but when she saw the man opening the rear of Clavijo's car and removing the music system, she consulted with Ullon and then called the police. Blandon testified that she neither saw nor heard the car window being broken.

Ullon testified that he got up the morning of the incident about 2:15 a.m. so he could travel to New York. He left the apartment to get coffee. He said that while in the parking lot, he saw a person walking around, trying to look in cars. He said that as he was about to exit the lot, he saw a man standing there and a bicycle lying on the ground. Ullon said the man turned to avoid being seen. Ullon drove by a second time to get a better look, but the man hid behind the cars.

Ullon said that he continued out the lot to get coffee and while doing so, called Blandon to tell her to call the police. He said he later called the police himself because they could not understand Blandon. Blandon testified that about fifteen minutes passed from the time Ullon called the police until the police arrived.

Blandon testified that after the police were called, she went across the hall to let Clavijo know what was happening. She rang his doorbell several times before he awoke and answered.

Though Blandon said she did not go to Clavijo's apartment until after seeing the police arrive, she spoke to Clavijo about the theft in the present tense. She told Clavijo, "somebody's robbing you," and did not tell Clavijo the police were there. Clavijo also testified that Blandon used the present tense: "they're stealing – they breaking [sic] into your car."

Blandon said Clavijo went to the lot, "and the police were right there." However, Clavijo described going back to sleep for five to ten minutes before going to the lot. He admitted to bringing a bat with him for protection. Clavijo testified that he "went downstairs to check [on his car]. And then the police officers arrived right there."

Clay testified that she was dispatched to the scene following a report that there was a black man trying to enter vehicles in the parking lot. When she arrived at the back of the lot, around 2:50 a.m., she heard a metallic clang and then saw a tall black man holding two stereo amplifiers. She identified the man as Perry. Clay said she also saw a metal bat on some debris on the ground near a fence behind Perry. She also found a box with two speakers and a maroon bicycle on the ground a couple car lengths away from where she encountered Perry.

Ullon testified that he returned to the apartment to drop off the coffee and pick up his son. He said that at the time he returned to the lot, he saw the man he had seen before in the lot with a young female police officer (presumably Clay).

Clay testified that when she encountered Perry, she asked him to put down the amplifiers and speak with her, which he did. She testified that Perry told her that he found the amplifiers in the lot and was only moving them. At trial, Perry explained that he did not want anyone to run over the amplifiers and was only moving them out of the way. Perry further testified that he had been taking a commonly-used shortcut through the lot and a nearby alley where it was common for people in the nearby apartments to discard refuse, including electronics. Perry testified that he had

had his bicycle with him earlier in the day, but had gotten a flat tire, such that he no longer had his bicycle with him when he was in the lot. Perry consistently denied breaking into the car and stealing equipment.

Perry told Clay that he had seen people running through the lot or an alley and that they must have stolen the equipment. He testified that one of the people had been riding a bicycle. Clay found one man nearby, but let him go after questioning him briefly.

Clay testified that she was then approached by the owner of the car, Clavijo. Clay and Clavijo went into the apartment building to speak with Blandon. Before going into the apartment building with Clavijo, Clay asked Perry to wait with Dunn, who had arrived on the scene.

Clay and Clavijo spoke with Blandon in the hallway between Clavijo's apartment and Blandon's, with Clavijo translating. Clay asked Blandon for a description of the person Blandon saw in the lot. Clay testified that Blandon did not give Clay any specific description.

Clay said that rather than providing a description, Blandon gestured toward her apartment window and told Clay that the person she had seen in the lot was currently standing in the lot talking with the other officer (Dunn). However, at trial, Blandon had no recollection of seeing the man with Dunn.

Blandon testified that she did see the man she had seen in the lot speaking with Clay. Blandon never explicitly testified whether she witnessed the initial encounter between Perry and Clay. She never said she saw the police encounter the man while he was holding stolen equipment.

The only testimony Blandon ever gave describing the man she claimed to see removing the equipment was that he appeared to be a young man of African descent and that he had a bicycle. She could not describe his clothing in any way. She could not remember the color of the bicycle at trial or when speaking to the police. She said she was "so scared" she "didn't really pay attention"

and thus could not describe the man's facial features in any way.

After speaking with Blandon, Clay then spoke with Ullon. Clay did not indicate that Ullon made any identification at that time. Nor did Ullon, during his testimony, indicate he made any identification to Clay at that time.

Clay arrested Perry at the scene the night of the break-in. She found a tool, "silver wrench vice pliers," in Perry's back pocket that Perry told her he carried in order to fix his bicycle. Perry testified that he had purchased the tool at Walmart. Clavijo, however, told Clay and testified that it was his tool, taken from his car. Clavijo admitted on cross examination that the wrench was of a common type and that he had purchased it at Walmart.

On September 21, 2008, Blandon and Ullon went to the police station. Ullon was shown a series of photos and asked to pick out the person he had seen in the lot. He testified that he picked a photo, but that "it was not entirely clear" because "it was night time" and "because of his black race." At trial, Ullon confirmed the photo he picked, and the photo lineup was published to the jury. Ullon never made an in-court identification of Perry as the man he had seen in the lot.

Blandon was also shown a photo array including a photo of Perry, but she could neither pick out any person as the man she saw in the lot nor provide a description because she "did not clearly perceive the details of his face". When asked at trial if she had been able to point out the person she saw taking something from Clavijo's car, Blandon responded, "Not point, as I said thank God the officer arrived in time and found out who the person was." Blandon never made an in-court identification of Perry as the man she had seen in the lot.

After hearing the evidence at trial, the jury found Perry guilty of theft by unauthorized taking and acquitted him of criminal mischief. The trial court sentenced Perry to 3 to 10 years at the New Hampshire State Prison. Perry appealed, but the New Hampshire Supreme Court rejected Perry's

due process claim. The New Hampshire Supreme Court agreed with the trial court that Perry was not protected by the Due Process Clause because the suggestive circumstances leading to Blandon's identification were not the result of police conduct. The New Hampshire Supreme Court based its ruling on the same legal question one month prior in State v. Michael Addison, 160 N.H. 792 (2010); Appendix 13.

The New Hampshire Supreme Court recognized that its decision was contrary to rulings of the United States Court of Appeal for the First Circuit, which has twice held that due process applies when an identification arises out of suggestive circumstances, regardless of whether the circumstances were created by state action. United States v. DeLeon-Quinones, 588 F.3d 748, 754 (1st Cir. 2009); United States v. Bouthot, 878 F. 2d 1506 (1st Cir. 1989). However, the New Hampshire Supreme Court declined to follow the First Circuit, stating:

> Until the United States Supreme Court has ruled on whether state action is a prerequisite to the Biggers test, this court and the First Circuit have parallel authority in passing on federal constitutional questions. [citation omitted]. We hold that the Biggers analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action.

Addison at 803; Appendix 19.

REASONS FOR GRANTING THE WRIT

The question arises from the conflicting holdings of the First Circuit and the New Hampshire Supreme Court regarding whether due process safeguards apply to all unreliable identifications or only to those orchestrated by state actors. The First Circuit's decision is based on principles set forth in this Court's cases. Other federal courts of appeal agree with the First Circuit. Nevertheless, the New Hampshire Supreme Court and some other courts have rejected the First Circuit's reasoning. The question should be considered because it has resulted in conflicting rulings among the lower courts, because those courts rejecting the First Circuit's reasoning do so contrary to principles established by this Court, and because unreliable eyewitness identification evidence creates a great risk that innocent defendants will be convicted.

I. RELIABILITY, RATHER THAN THE PRESENCE OR ABSENCE OF STATE ACTION, "IS THE LINCHPIN IN DETERMINING THE ADMISSIBILITY OF IDENTIFICATION TESTIMONY"[1]

The New Hampshire Supreme Court erred because it failed to examine this Court's cases addressing due process and eyewitness identification evidence. The constitutional principles which govern the admissibility of eyewitness identification testimony differ from the principles which govern the exclusionary rule. In the eyewitness identification context, the Due Process Clause of the Fourteenth Amendment of the United States Constitution protects against unfair trials and wrongful convictions resulting from unreliable eyewitness testimony. Unreliable eyewitness evidence is excluded not to address the violation of a constitutional right but rather because the admission of unreliable evidence would itself violate due process. In contrast, when evidence is obtained in violation of the Fourth or Fifth Amendment, or some other independent constitutional right, the evidence may be excluded by operation of the exclusionary rule as means of deterring similar future violations, regardless of the reliability of the evidence.

These principles are set forth in this Court's cases. Evidence derived from an unconstitutional interrogation or search is excluded from trial for the purpose of deterring future police misconduct. See, e.g., Colorado v. Connelly, 479 U.S. 157, 166 (1986); United States v. Leon, 468 U.S. 897, 906-913 (1984). The focus of the exclusionary rule is on the violation of a constitutional right and on deterring future violations of that right. Connelly, 479 U.S. at 166 ("The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."). Thus, the exclusionary rule does not operate when "law enforcement officers have acted in objective good faith" in reliance on a warrant, Leon, 468 U.S. at 908, nor does it operate to bar admission of an involuntary confession which was not the product of

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[1] Manson v. Brathwaite, 432 U.S. 98 (1977), discussed in detail infra.

police interrogation or other state action. Connelly, 479 U.S. at 165. Similarly, the Fourth Amendment protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, affected by a private individual not acting as an agent of the Government.'" United States v. Jacobsen, 466 U.S. 109, 13-114 (1984), quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting); See also Coolidge v. New Hampshire, 403 U.S. 443, 487-490 (1971). In short, evidence which does not derive from police misconduct is not suppressed by operation of the exclusionary rule because there is no improper state action to deter.

The due process principles governing the admissibility of eyewitness identification evidence have a different foundation. In this context the focus is on the reliability of the evidence and fairness at trial, rather than on police misconduct and deterring future constitutional violations. This Court's concern with the reliability of eyewitness identifications is longstanding. The Court has stated that "the vagaries of eyewitness identification are well-known," that "the annals of criminal law are rife with instances of mistaken identification," and that "the identification of strangers is proverbially untrustworthy." United States v. Wade, 388 U.S. 218, 228-229 (1967) (footnotes, citations, and quotes omitted). For these reasons, in Stovall v. Denno, 388 U.S. 293 (1967), Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Brathwaite, 432 U.S. 98, 114 (1977), the Court established principles recognizing and governing due process claims relating to eyewitness identification.

Reiterating the potential "dangers and unfairness" inherent in eyewitness identification testimony, Stovall 388 U.S. at 298, the Court held that the Due Process Clause protects against "unnecessarily suggestive" identifications which are "conducive to irreparable mistaken identification." Stovall 388 U.S. at 302 ("This is a recognized ground of attack . . . ."). Stovall

further instructed trial courts that whether due process principles have been violated in this context "depends on the totality of the circumstances." Id.

The Court next considered whether unnecessarily suggestive police procedures automatically resulted in the exclusion of identification evidence from trial. In Neil v. Biggers the Court explained that the admissibility of eyewitness identification testimony is not governed by operation of the exclusionary rule. Such a rule would be inconsistent with the purpose of due process protections in this context. Id. at 409 U.S. at 199. Identification evidence arising from suggestive circumstances is not barred from trial because the defendant's rights were violated. Id. at 198. In fact, such evidence is not automatically barred at all, even when the suggestive circumstances were created by police misconduct. Id. ("evidence of a showup without more does not violate due process"). Rather, "it is the likelihood of misidentification which violates a defendant's right to due process and which is the basis of the exclusion of evidence." Id. In short, the constitutional error does not derive from state action creating the suggestive circumstances, but rather from the admission into evidence of an unreliable identification that is substantially likely to condemn the wrong person.

In Manson, the Court completed its explanation of due process principles regarding eyewitness identifications. The Court stated that:

> Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Thus considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem.

432 U.S. at 113. Stovall and Biggers "did not, singly or together, establish a strict exclusionary rule" because "the standard, after all, is that of fairness as required by the Due Process Clause." Id. The goal is not to penalize a violation of constitutional rights during the creation of suggestive

circumstances that lead to an identification, but rather to protect an "evidentiary interest" in the fairness of the trial process. Id. Thus, "reliability is the linchpin in determining the admissibility of identification testimony." Id. at 114.

II. THE COURT DEVELOPED A TWO-PART ANALYSIS TO PREVENT EYEWITNESS IDENTIFICATION WHEN THERE IS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION

The Court's cases resulted in a specific framework for evaluating the admissibility of eyewitness identification testimony. The first step in the analysis is determining whether an identification arises out of unnecessarily suggestive circumstances. Bouthot, 878 F. 2d at 1514; DeLeon-Quinones 588 F. 3d at 753. If there were no suggestive circumstances, then the due process concerns about reliability are not implicated. Id. However, if unnecessarily suggestive circumstances were involved, then the second step is to consider whether there is a "very substantial likelihood of misidentification." Manson, 432 U.S. at 116; Bouthot, 878 F. 2d at 1514; DeLeon-Quinones 588 F. 3d at 753. While the cases before this Court have always involved police conduct, the Court has never said that state action must be involved in the identification before a trial court may rely on due process to bar an identification that is substantially likely to be wrong.

Whether there is a substantial likelihood of misidentification such that due process bars use of identification evidence at trial is determined by the "totality of the circumstances." Stovall 388 U.S. at 302; Simmons v. United States, 390 U.S. 377, 383 (1968); Foster v. California, 394 U.S. 440, 442 (1969); Manson, 432 U.S. at 113. In Biggers, the Court reiterated the necessity of considering the totality of the circumstances but stated that specific factors to be considered include:

(1) the witness's opportunity to view the criminal;
(2) the witness's degree of attention;

(3) the accuracy of any prior description given by the witness;
(4) the witness's level of certainty in making the identification; and
(5) the lapse of time between the crime and the confrontation.

409 U.S. at 199-200. The Court has also stated that "against these factors is to be weighed the corruptive effect of the suggestive identification itself." Manson, 432 U.S. at 114.

III. BLANDON'S IDENTIFICATION OF PERRY WAS SUBSTANTIALLY LIKELY TO BE WRONG BUT THE LOWER COURTS NEVER REACHED THAT ISSUE BECAUSE THEY FAILED TO CONDUCT THE REQUIRED DUE PROCESS ANALYSIS

Perry's case presents the kind of unreliable eyewitness identification evidence which should be addressed according to the due process principles recognized by this Court. Nubia Blandon's identification of Perry would have been barred from trial had the lower courts found that due process applied and engaged in the two-part analysis required by this Court. This petition does not ask this Court to engage in that factual analysis but rather to find that the lower courts erred when they failed to do so. The record demonstrates that Perry elicited more than sufficient grounds to warrant the required two-part due process analysis.

Addressing each of the Biggers factors in light of the suggestive circumstances illustrates that Blandon's out-of-court identification was unreliable. First, in terms of her "opportunity to view," there was not evidence to indicate that Blandon had a good opportunity to observe the perpetrator before the police arrived. At the suppression hearing, Clay could not say how Blandon came to observe the perpetrator or how long she observed him. The period of observation could have been as little as "a couple of minutes." Clay could not say whether Blandon's observation was interrupted or whether Blandon was engaged in other activities, such as calling the police, during her observation. The observation took place at night from at least two or three stories above a partially-lit lot with nearby trees. Clay never looked from the window herself, so she could not

describe the view from Blandon's vantage point.

Second, the State presented no evidence regarding Blandon's "degree of attention." Blandon's inability to provide any substantial description of the perpetrator tends to undermine any assertion that she did pay close attention.

Third, Blandon gave almost no "prior description" of the perpetrator. The only description presented at the suppression hearing was that the perpetrator was a tall black man.

Fourth, regarding Blandon's "level of certainty in making the identification," the State presented no evidence at the suppression hearing indicating that Blandon expressed either doubt or a particular degree of certainty regarding her identification. There is no indication that Clay asked whether Blandon was certain about the identification.

Fifth, regarding "the lapse of time between the crime and the confrontation," there was a relatively short lapse of time between the observation of the crime and the identification. A short period of time between the crime and the identification typically enhances the reliability of the identification because the witness's memory remains fresh. However, in this case, it was precisely because the police encounter with Perry took place shortly after the report of the crime that Blandon might assume the police had apprehended the perpetrator. Further, Blandon's failure to provide any substantial description to the police, when asked immediately after the crime, indicates that she never had substantial identifying information. Thus, it was not staleness or freshness of her memory that was at issue, but rather whether Blandon ever had any reliable information regarding the perpetrator.

Finally, Blandon was unable to pick Perry from a photo array. While failures to make later identifications are not listed among the Biggers factors, in the instant case, the failure to identify Perry from the array clearly undermines the reliability of the identification under the totality of the

circumstances. This failure to select a photo from an array of men presumably matching Blandon's meager description stands in stark contrast to Blandon's pointing to Perry as the lone black man standing with the uniformed officer.

Based on these facts and this Court's cases, Perry was entitled to have his due process claims considered by the lower courts. However, since both declined to find due process protections applicable, Blandon's unreliable identification was admitted into evidence and considered by the jury which convicted Perry.

IV. THE NEW HAMPSHIRE SUPREME COURT'S DECSIONS WAS CONTRARY TO PRINCIPLES RECOGNIZED BY THIS COURT, AS ILLUSTRATED BY THE DECISIONS OF FEDERAL COURTS OF APPEAL

In declining to follow precedents of the First Circuit Court of Appeal, the New Hampshire Supreme Court acted contrary to the principles established by this Court in Stovall, Manson, and Biggers. The cases from the First Circuit are Bouthot and DeLeon-Quinones. In Bouthot, 878 F.2d 1506, the witness failed to identify the defendant in a photo lineup shortly after witnessing the crime. Thereafter the witness saw the defendant in court and watched him during courtroom proceedings. Two years later, the witness claimed to be able to identify the defendant. 878 F.2d at 1513-15. In response to a motion to suppress, the prosecution argued that due process protections were inapplicable because there was no police misconduct which created the suggestive circumstances allegedly giving rise to the identification. Id. 1514. The prosecution argued the situation was analogous to Connelly, 479 U.S. 157, a case in which this Court declined to apply the exclusionary rule to a confession which resulted from the defendant's own mental illness rather than from a violation of the defendant's constitutional rights by the police. The First Circuit rejected the analogy:

> The Connelly logic does not apply to this case. Whereas coerced confessions may violate an independent constitutionally protected interest, the suggestive identification of a suspect per se does not violate any constitutionally protected interest. In the latter scenario, a constitutional violation, if any, occurs only when testimony regarding the suggestive pretrial identification (or an in-court identification based upon it) is introduced at trial. [citations omitted] Whereas a coerced confession is suppressed primarily to deter future violations of the Constitution, overly suggestive identifications are suppressed primarily to avoid an unfair trial. [citation omitted] In the latter scenario, the Due Process Clause protects an evidentiary interest: reliability. . . . . Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that **federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process**.

Bouthot, 878 F.2d at 1515-16 (emphasis added). Applying these principles, the First Circuit then conducted the two-part due process analysis adopted by this Court.

Twenty years later, the First Circuit reaffirmed Bouthot in De Leon-Quinones. That case involved another unplanned courtroom encounter which was not orchestrated by the prosecution or the police. 588 F. 3d at 754. Again, the prosecution responded to the defense motion to suppress by arguing that the exclusionary rule does not apply in the absence of improper state action. As in Bouthot, the First Circuit rejected the prosecution argument that state action was necessary and conducted the required due process analysis. Id. at 754-56.

The Bouthot – De Leon-Quinones interpretation of this Court's case law is correct and is supported by Stovall, Biggers, and Manson. Those cases emphasize that the due process concern is with the reliability of identification evidence. Biggers, 409 U.S. at 198; Manson, 432 U.S. at 113. They expressly reject the idea that suggestive identifications violate a constitutional right or require a per se exclusionary rule. Manson, 432 U.S. at 113. Most importantly, the cases establish that due process does not operate in this context to deter police misconduct or other improper state action but rather to protect against the injustice caused by mistaken eyewitness identification testimony. Id.

Other federal courts of appeal agree with the First Circuit. In Green v. Loggins, 614 F. 2d

219 (9th Cir. 1980), the witness failed to identify the defendant during a police photo lineup four hours after a shooting. Months later, while both the defendant and the witness were in jail, there was an "accidental, inadvertent encounter" in which jail officials called the defendant by name in the presence of the witness. Id. at 222. The defendant sought to exclude the witness's in-court identification as a product of that suggestive encounter. The prosecution responded that the "the fundamental purpose of judicial review in the context of a pre-trial confrontation is the deterrence of culpable police conduct" and thus the defendant should be denied relief because "exclusion of the challenged in-court identification will not serve any deterrent purpose." Id. Relying on Manson, the Ninth Circuit rejected this argument.

> Although we recognize that there is no intentionally wrongful police conduct involved in an accidental encounter, we also recognize that the deterrence of such conduct is not the primary purpose behind judicial review of tainted identification testimony. Rather, a court reviews a challenged in-court identification essentially to determine whether the witness' testimony retains sufficient indicia of reliability. . . . **A court is obligated to review every pre-trial encounter, accidental or otherwise, in order to insure that the circumstances of the particular encounter have not been so suggestive as to undermine the reliability of the witness' subsequent identification**.

Id. at 222-223 (emphasis added). The Ninth Circuit then reviewed the record and upheld the district court's grant of a writ of habeas corpus based on factual findings that the inadvertently suggestive circumstances gave rise to an unreliable in-court identification.[2]

The Sixth Circuit has followed the Ninth Circuit's Green opinion. In Thigpen v. Cory, 804 F. 2d 893 (6th Cir. 1986), the defendant argued in a federal habeas claim that his due process rights

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[2] Another Ninth Circuit panel and one of the circuit's district courts have followed these same principles. See Dearinger v. United States, 468 F. 2d 1032, 1035-36 (9th Cir. 1972) (whether news stories and photos of defendant tainted in-court identification recognized as a due process claim governed by Stovall); Easter v. Stainer, 1994 U.S. Dist. Lexis 5668, order at 49-53 (N.D. CA. 1994) (analyzing claim that news stories rendered identification inadmissible as a due process claim governed by totality of the circumstances review and the five factors in Biggers). But see United States v. Peele, 574 F 2d 489, 491 (9th Cir. 1978) (pre-dating Green, stating that Stovall does not apply where there was no police involvement in the suggestive identification procedure but also acknowledging that "a case might arise where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based principally on the

were violated when a witness identified him during trial. The witness had failed to identify the defendant in a police lineup but, after seeing the defendant during pretrial proceedings, claimed to be able to make an identification at trial. The "state appellate court and the federal district court relied on the fact that police machinations did not cause the confrontations between the witness and the defendant" and thus denied relief. Id. at 895. The Sixth Circuit reversed, stating that, "This was an erroneous basis for decision, for the deterrence of police misconduct is not the basic purpose for excluding identification evidence." Id. Citing Green as well as this Court's statement in Manson that "is the likelihood of misidentification that violates a defendant's right to due process," the Sixth Circuit found due process applicable regardless of whether the police created the suggestive circumstances. Id. After analyzing the totality of the suggestive circumstances in light of the Biggers factors, the court found that the identification was unreliable and that the defendant's due process rights had been violated. Id. at 897. The Sixth Circuit reversed the district court and remanded with an order to grant the writ of habeas corpus. Id. at 989.

The Second Circuit has expressly adopted the conclusions reached in Bouthot, Green, and Thigpen. In Dunnigan v. Keane, 137 F. 3d 117 (2nd Cir. 1998), the prosecution argued that due process principles did not apply to the defendant's challenge of an identification which was the result of suggestive circumstances created by a "private investigator acting independently and not as an agent of the police." Id. at 128. The Second Circuit rejected that argument citing the analysis in Bouthot, 878 F. 2d at 1516, as well as this Court's statements that it is the admission into evidence of an unreliable identification which violates the defendant's right to due process, Biggers, 409 U.S. at 198, not the creation of the suggestive circumstances which led to the unreliable identification. Manson, 432 U.S. at 113, n. 13. Thus, the Dunnigan court concluded that "the linchpin of

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testimony of that witness violates due process.)

admissibility, therefore, is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable." Dunnigan, 137 F. 3d at 128. See also Raheem v. Kelly, 257 F.3d 122, 137 (2nd Cir. 2001) (unintentionally suggestive lineup subject to due process analysis because "the purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of misidentification.")

The Tenth Circuit has also applied due process principles to claims that suggestive circumstances, such as newspaper photos, led to an unreliable identification even though the circumstances were not the product of state action. United States v. Elliot, 915 F. 2d 1455 (10th Cir. 1990) (applying Manson and due process principles to an in-court identification by a witness who had seen a photo of the defendant in newspaper); United States v. Milano, 443 F.2d 1022 (10th Cir. 1971) (same).

These opinions of five federal circuit courts of appeal and the principles stated in this Court's cases establish that the New Hampshire Courts were clearly wrong in failing to recognize that due process protections apply to Perry's claim.[3] The New Hampshire Supreme Court simply failed to recognize the basis of this Court's opinions regarding eyewitness identification evidence, notwithstanding precedent from the First Circuit and other federal courts of appeal.

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[3] The conflict and uncertainty among the lower courts regarding this issue is also seen when defendants convicted in state court seek habeas corpus relief in federal court. While defendants presenting claims such as Perry's find substantial support in cases from the federal courts of appeal, the claims are nonetheless denied because there are conflicting state court opinions and because this Court has never addressed the issue. See Richardson v. Superintendent, 621 F. 3d 196, 202 (2nd Cir. 2010), reversing Richardson v. Superintendent, 539 F. Supp. 266 (E.D. NY. 2009) ("Given the absence of any holding from the Supreme Court addressing circumstances like these," the district court was not justified in overturning the state court decisions.); Owens v. Ortiz, 2007 U.S. Dist. LEXIS 98206, 2007 WL 6030392 (D.Colo. 2007) (The federal district court said the state court was wrong to rely on Connelly in requiring state action, but habeas relief was denied because there has not yet been a Supreme Court opinion directly addressing the issue.)

V. SOME COURTS AGREE WITH THE NEW HAMPSHIRE SUPREME COURT, BUT THOSE COURTS IGNORE OR FAIL TO FOLLOW THE PRINCIPLES ESTABLISHED BY THIS COURT

As noted by the New Hampshire Supreme Court, there are some cases which support its holding. Examining those cases does not establish the validity of the New Hampshire Supreme Court's holding but the cases do show why this Court should grant review of Perry's case.

The New Hampshire Supreme Court cited two federal cases. The court cited United States v. Kimberlin, 805 F.2d 210, 233 (7th Cir. 1986), which contains a single line of analysis stating "we do not agree" that due process applies when the witness saw the defendant on television. The court also cited United States v. Zeiler, 470 F. 2d 717, 720 (3rd Cir. 1972), which held that due process does not apply when a witness is exposed to news stories which might influence later identification testimony but never cites or discusses this Court's explanation of due process in Stovall, Biggers, or Manson.

The New Hampshire Supreme Court also cited the decisions of other state courts. While nominally on point, those decisions either completely ignore or contradict the principles set forth in Stovall, Manson, and Biggers. Green v. State, 279 Ga. 455, 614 S.E.2d 751, 754-55 (Ga. 2005), only cites other state court opinions with no discussion of any opinion by this Court or any federal court of appeal on the due process issue. Commonwealth v. Colon-Cruz, 408 Mass. 533, 562 N.E.2d 797, 805 (Mass. 1990), contains a one line analysis with no mention of federal cases explaining due process. In State v. Pailon, 590 A.2d 858, 863 (R.I. 1991), Rhode Island adopts the Colorado v. Connelly argument which was expressly rejected by the First Circuit in Bouthot. (The Rhode Island opinion does not cite Bouthot or refer to the language in Stovall, Manson, and Biggers. Thus, there are two state supreme courts (New Hampshire and Rhode Island) within the First Circuit which reject First Circuit analysis of this important federal constitutional issue)

Finally, State v. Reid, 91 S.W.3d 247, 272-73 (Tenn. 2002) cert. denied, 540 U.S. 828, 124 S. Ct. 56, 157 L. Ed. 2d 52 (2003), follows Pailon with no independent examination of federal cases.

VI. AFTER REVIEW, THIS COURT SHOULD REMAIND WITH INSTRUCTIONS THAT THE NEW HAMPSHIRE COURTS APPLY DUE PROCESS PRINCIPLES TO PERRY'S CLAIM

There is a conflict between the decisions of federal courts of appeal and decisions of state highest appellate courts. Moreover, the state court decisions incorrectly ignore this Court's explanation of due process as well as the federal circuit court opinions explaining those principles. This Court should act to correct the New Hampshire Supreme Court's failure to follow those principles. Perry's request is that the Court grant review and thereafter remand this case to the New Hampshire courts. In the remand the lower courts should be instructed that due process protections apply regardless of whether state action gave rise to Blandon's identification of Perry.

CONCLUSION

For all of the foregoing reasons, this Court should grant Perry's petition for a writ of certiorari.

Respectfully submitted,

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OPPOSITION BRIEF

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THE SUPREME COURT OF THE UNITED STATES

Barion Perry,
Petitioner

v.

The State of New Hampshire,
Respondent

On Petition For Writ Of Certiorari
To The New Hampshire Supreme Court

BRIEF IN OPPOSITION FOR THE STATE OF NEW HAMPSHIRE, RESPONDENT

THE STATE OF NEW HAMPSHIRE

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QUESTION PRESENTED

Whether the New Hampshire Supreme Court correctly determined that the admission at trial of a pretrial identification cannot violate due process where no improper state action has caused the circumstances under which the identification was made.

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STATEMENT OF THE CASE

A. The State's Evidence At The Suppression Hearing

At 2:53 a.m. on August 15, 2008, Officer Nicole Clay from the Nashua, New Hampshire Police Department was sent to the parking lot behind 70½ West Hollis Street to investigate "a report about a black male looking through vehicles and attempting to gain entry into vehicles." MH 7–8.[1] When she arrived at the multi-story apartment building, she parked her cruiser out front and walked around the building. MH 8–9, 12. There were twelve to fifteen cars in the parking lot, which was "fairly well lit" by lights in the parking lot, lights on the back of the building, and streetlights on Ash Street, which was the street at the exit to the parking lot. MH 25–26.

As Officer Clary entered the parking lot, she heard what "sounded like a metal bat hitting the ground," and she then saw Perry carrying two amplifiers and walking toward her from between two vehicles. MH 8–9. She asked him to put the amplifiers down and come talk to her, so he did. MH 9. He then said that he was moving the amplifiers because he had just found them lying on the ground. MH 10. Officer Clay asked where they had come from, and Perry said "that he had just seen a couple of kids leaving the

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[1] "JT" refers to the sequentially paginated transcripts of the jury trial on June 16-17, 2009.
"MH" refers to the transcript of the suppression hearing on April 20, 2009.
"Pet." refers to the petition for writ of certiorari
"Pet. App." refers to the appendix to the petition for writ of certiorari.
"PSB" refers to Perry's brief to the New Hampshire Supreme Court.
"Resp. app." refers to the attached appendix to the respondent's brief in opposition.
"RSB" refers to the respondent's brief to the New Hampshire Supreme Court.

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parking lot," that one of them was wearing a white T-shirt, and that the other one was on Ash Street. MH 10.

Officer Clay walked with Perry to Ash Street where he pointed out a Hispanic man who was standing outside a nearby house. MH 10–11. The man said that his name was Rowley Anzani, that he had been in the house all night, that he had just come outside to do something for his mother, that his friend had left half an hour earlier, and that he had not seen anyone else on Ash Street in the last ten minutes. MH 11–12. While Officer Clay was talking to Anzani, Perry kept interjecting "that he had just found the amplifiers and that other kids had stolen them." MH 12.

When Officer Clay and Perry returned to the parking lot, Alex Clavijo walked over and said that his neighbor had told him that his car had been broken into. MH 12. He also said that a large wooden box with two speakers mounted inside and the amplifiers had been taken from his car. MH 36–39. By then, Officer Robert Dunn had arrived, so Officer Clay asked him to wait with Perry while she went inside. MH 13–14. Perry was just standing talking to Officer Dunn in the middle of the parking lot, and he was not handcuffed or otherwise restrained. MH 10–11, 27.

Clavijo and Officer Clay went up to the second or third floor apartment of his neighbor, Nubia Blandon, who came out and spoke to them in the hallway. MH 14. Blandon spoke only Spanish, so Clavijo translated. MH 14. Officer Clay did not tell Blandon that there was a suspect in the parking lot with an officer, and they could not see the parking lot from the hallway. MH 14, 19, 46. Blandon said that she had seen a tall, black man walk through the parking lot, look into all the cars, circle Clavijo's car, and

then open the trunk of Clavijo's car and remove a large box. MH 24–25.[2] Blandon also said that the man had been carrying a bat. MH 25. Officer Clay asked for a description, and Blandon pointed toward the window and said "it was the man standing outside with the police officer." MH 24. Blandon did not describe Perry's clothing or features because the police were already talking to him. MH 30. Officer Clay did not ask Blandon how long she had been watching Perry, but it would have taken at least a couple of minutes for him to take the actions Blandon had described. MH 32.

In the meantime, Blandon's husband, Joffre Ullon, who had made the initial report about a man trying to break into cars, returned from getting coffee. MH 23, 46. He said that he had seen "a black male walking through the parking lot and lifting up on the [car] door handles." MH 24. Officer Clay asked him for a description, and he also said "it was the man standing outside with the police officer." MH 24. Officer Clay went back outside and saw that Perry and Officer Dunn had moved to the end of the lot, which was about thirty feet away and not as well lit. MH 26. She then found Clavijo's wooden box and speakers near the exit to the parking lot. MH 40. A month later, Blandon was shown a photographic array, but she was unable to identify Perry. MH 28.

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[2] Although the hearing transcript uses the word "truck" several times, the items were taken from the "trunk" of Clavijo's car. JT 169-70.

B. Other Evidence From The State's Case At Trial

Clavijo lived on the fourth floor across the hall from Blandon and Ullon. JT 31–33, 120. Their apartment faced the parking lot where Clavijo kept his black Honda Civic, but his windows faced West Hollis Street, so he could not see the lot. JT 33-33, 52.

On August 15, 2008, Blandon and Ullon got up at 2:15 a.m. because Ullon had to go to New York. JT 108, 130. Blandon went into the kitchen and looked out the window. JT 109. It was a long distance down to the parking lot, "but the view was perfect." JT 121. Blandon was surprised when she saw a tall black man riding a bicycle through the parking lot and looking into cars, so she kept watching to see what he was doing. JT 109, 119. Before Ullon left to get coffee at 2:30 a.m., Blandon told him that a black man was riding around on a bicycle in the parking lot. JT 124, 130.

Ullon went outside and saw Perry walking around looking into cars. JT 131, 135. As Ullon drove out of the parking lot, he saw a bicycle lying near the Ash Street exit. JT 131. Perry was standing nearby in a well-lit area, but he turned around and hid his face from Ullon. JT 131, 138. Ullon drove back into the parking lot to try to get a closer look, but Perry then hid behind some cars. JT 131, 136.

In the meantime, after Ullon went downstairs, Blandon watched Perry ride around the parking lot twice and then leave his bicycle by the Ash Street exit and walk over to Clavijo's car. JT 109, 121. Only the back of Clavijo's car was visible to Blandon because there was a large vehicle parked next to it. JT 110. She saw Perry open the trunk and remove a box that was very big, so she called Ullon. JT 110–11, 126. At that point, she had been watching Perry for about half an hour, but she was scared and trying

to see what he was doing, so she was not paying attention to his clothing. JT 112. Ullon told her to call the police, so she did, but they could not understand her, so she called Ullon, and then he called the police. JT 110, 122–23, 132–33.

When Officer Clay walked into the parking lot, she heard a loud metallic clang, saw Perry walking out from between two vehicles carrying two amplifiers, and then saw a metal bat on the ground behind him. JT 67–68, 79. Perry said that he was moving the amplifiers because he had found them in the middle of the parking lot. JT 71, 89–90. He also said that two other people had stolen the items and he pointed out Anzani, but Officer Clay determined that Anzani was not involved. JT 71, 73–74. At that point, Officer Dunn arrived. JT 100. Both police cruisers were parked in front of the building, so they were not visible from the parking lot, the hallway, or the window of Blandon and Ullon's apartment. JT 102.

After Blandon saw Officer Clay walk into the parking lot and talk to Perry, she went to wake up Clavijo to tell him that someone was "robbing" his car. JT 112–15, 119. Blandon then returned to her window. JT 59-61. Clavijo grabbed a bat for protection and went downstairs. JT 112. He then saw that the left rear window on his car was broken, that another window was open, that there were wires hanging out of the open trunk of the car, and that his two amplifiers, a large box containing two speakers, a wrench he used to open the windows, and his metal baseball bat were all missing. JT 35–37, 52, 57–58. Clavijo told Officer Clay what was missing, and that Blandon had told him that his car had been broken into. JT 40–41. Blandon saw Officer Clay and Clavijo coming upstairs, so she waited at the door and then spoke to them in the hallway. JT 117.

Ullon returned while Perry was in the parking lot with an officer, and then he went upstairs to where Officer Clay was talking to Blandon. JT 131.

Officer Clay found Clavijo's box and speakers next to a bicycle that was lying near the Ash Street exit to the parking lot, which was only a couple of car lengths from where she had first seen Perry with the amplifiers. JT 39, 47–48, 81. She also found Clavijo's wrench in Perry's pocket. JT 46, 57–58, 89. Perry claimed that it was his wrench, and that he used it to fix his bicycle tires. JT 89–90.

Later that morning, Perry waived his *Miranda* rights and spoke to an officer. JT 151–71. He continued to deny breaking into Clavijo's car and stealing items from it. JT 171. He also claimed that earlier the same day, he had bought the same type of stereo equipment that was found in the parking lot. JT 155–56. He further claimed that he had used the wrench to fix the tire on his bike earlier that day, but he had not ridden the bike to West Hollis Street. JT 164, 167.

Blandon and Ullon were later separately shown a photographic array containing a photograph of Perry. JT 172–77. Blandon could not identify Perry because she had not "clearly perceive[d] the details of his face." JT 128. Ullon had not seen Perry's features clearly, but he still "recognized his face," JT 137, and he "immediately" picked out Perry's photograph, JT 177.

C. Relevant Events Before, During, And After Trial

Perry was indicted on one felony count of theft by unauthorized taking, which was subject to an extended term of imprisonment because he had two prior convictions for

theft by unauthorized taking and one prior conviction for burglary. Resp. App. A1. *See* N.H. Rev. Stat. Ann. § 637:3 (2007); N.H. Rev. Stat. Ann. § 637:11, II(b) (2007). Perry was also charged by information with the misdemeanor offense of criminal mischief. Resp. App. A2. *See* N.H. Rev. Stat. Ann. § 634:2, I, II(a) (Supp. 2009).

Prior to trial, Perry moved to suppress Blandon's out-of-court identification pursuant to the due process clauses of the state and federal constitutions. Resp. App. A3-A6 (citing U.S. Const. amends. V, XIV; N.H. Const. pt. I, art. 15).[3] He argued, in relevant part: (1) that the Due Process Clauses of the Fifth and Fourteen Amendments "require that evidence of eyewitness identification be suppressed whenever unnecessarily suggestive identification procedures have resulted in an unreliable identification"; (2) that courts must "apply a 'totality of the circumstances' test in determining whether the [a]ccused's due process rights had been violated by an unnecessarily suggestive show up," Resp. App. A4 (quoting *Neil v. Biggers*, 409 U.S. 188, 412 (1972)); (3) that the identification procedure had been "unnecessarily suggestive" and "essentially a one-man show-up" because Blandon had "definitely" identified Perry "only because she [had seen] him being arrested," and had "relie[d] heavily on context cues, such as handcuffs and police cruisers," Resp. App. A5; and (4) that Blandon "was only able to describe him as tall, skinny and black," but "was unable to describe facial features, length of hair, hair style or what the perpetrator was wearing," and "was unable to pick him out of a line-up,

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[3] The motion appended to Perry's petition is a motion to suppress the in-court identification. Pet. App. A3-A6. However, there was no in-court identification, so the relevant motion is the motion to suppress the out-of-court identification. Resp. App. A3-A6.

which indicate[d] that she did not have sufficient time or opportunity to observe," Resp. App. A6.

The State objected, arguing, in relevant part: (1) that "Blandon's identification of [Perry] was not facilitated by the police in any fashion," Resp. App. A12; and (2) that the identification "was not unnecessarily suggestive" because Blandon had "witnessed [Perry]'s commission of the crime first hand" and had then identified him "independently from police facilitation," Resp. App. A14. The State also argued that the identification had been nonetheless reliable where it was clear: (1) that Blandon had "an excellent opportunity to view" Perry because she had described his actions in detail and had, "without hesitation, identified him as the one with the officer," Resp. App. A15-A16; (2) that Blandon had to have paid a great "degree of attention" because she had accurately described Perry's "gender and race," had said "that he was carrying a bat which was found at the scene," and had said that he had "removed a large object from the victim's car, which proved to be accurate," Resp. App. A16; (3) that although Blandon had not given a detailed description, she had accurately described Perry's "physical characteristics," Resp. App. A16; (4) that Blandon had been certain and had "immediately identified him as the one in the back of the parking lot standing with the officer," Resp. App. A17; and (5) that Blandon had made the identification "only a matter of minutes after the occurrence of the crime in question," Resp. App. A17.

At a hearing on the motion, Perry argued that "the investigation that Officer Clay conducted and the fact that she told [him] to remain where he was as well as her lack of follow-up with the eyewitnesses [was] enough of a state action . . . ." MH 42. The State

argued that because Officer Clay had asked Perry to stand with another officer only because there was an ongoing investigation, had not restrained Perry in any way, and had not suggested that he was the suspect, MH 42, there were "no specific actions taken by the police that would establish that they[were] suggesting the identification of [Perry]," which was required "in order to say that it was unduly suggestive," MH 43. The State also argued that the officers could not have controlled the conditions of Blandon's identification because they had not known she was looking out the window. MH 43-44.

Perry then argued that Blandon had relied on context cues such as uniformed police officers and cruisers and that she had been unable to identify him when those cues were not present. MH 44. The State argued that Blandon's failure to select Perry's photograph went only to the weight of the identification. MH 45. Therefore, contrary to Perry's claim, Pet. 4, the State did argue that the procedure had not been "unnecessarily suggestive," which is the standard that applies. *See Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (a defendant can claim that "the confrontation conducted . . . was so *unnecessarily suggestive* and conductive to irreparable mistaken identification that he was denied due process of law" (emphasis added)), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Hillsborough County Superior Court for the Southern Judicial District (*Sullivan*, J.) (the motion court) ruled that "Blandon's identification of Mr. Perry was not derived from any suggestive technique employed by the police," Pet. App. A10. It also ruled that although the facts that there were "less-than-ideal conditions for identification," that Perry "was standing with a uniformed officer in the parking lot where the crime

occurred," "that he was the only black male in the vicinity," and that Blandon could not later identify him in a photographic array might cast doubt on her identification, Pet. App. A10, those facts "d[id] not make the police behavior more suggestive," so it "need not consider whether the identification was otherwise reliable." Pet. App. A10.

Blandon's out-of-court identification was admitted at trial, JT 77, but she was not asked to make an in-court identification of Perry. At the close of the evidence, Perry was found not guilty of criminal mischief, and guilty as charged of theft by unauthorized taking. Resp. App. A1–A2; JT 288–89.

Perry appealed his conviction to the New Hampshire Supreme Court (the state court) arguing: (1) that the identification had been "functionally a one-man show-up, a procedure that has been found to be highly-suggestive and unreliable," (2) that "[r]eliability, not police intent, is the critical factor in determining admissibility," and (3) that "the identification lacked indicia of reliability constituting clear and convincing evidence that the identification was based upon observations other than and uninfluenced by the suggestive procedure." PSB 15. The State argued: (1) that Perry's "argument that the court erred in excluding the identification solely because it had not been manufactured by any state action [was] not preserved"; (2) that the motion court had properly ruled "that the actions of the police were not unnecessarily suggestive"; and (3) that application of the *Biggers* factors demonstrated that the identification had been nevertheless reliable. RSB 15.

The state court did not address the preservation argument. Pet. App. A1-A2. Instead, it "decline[d] to adopt the First Circuit's reasoning that a *Biggers* analysis is

required in all 'suggestive identification procedure,'" and held "'that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action.'" Pet. App. A2 (quoting *State v. Addison*, 160 N.H. 792, 801, 8 A.3d 118, 125 (2010)). The state court then found that "[b]ecause the evidence support[ed] the trial court's finding that Mr. Perry failed to carry his burden of proof on the first step of the *Biggers* analysis, [it] need not consider the second step." Pet. App. A2.

suggestive identification procedure that has been caused or orchestrated by the police because "[t]he constitutional principles which govern the admissibility of eyewitness identification differ from the principles which govern the exclusionary rule." Pet. 11. In making that claim, he argues that "[u]nreliable eyewitness evidence is excluded not to address the violation of a constitutional right but rather because the admission of unreliable evidence would itself violate due process." Pet. 11. He also argues that the due process principles applied by this Court in other contexts are inapplicable because "[e]vidence derived from an unconstitutional interrogation or search is excluded from trial for the purpose of deterring future police misconduct." Pet. 11.

"The Due Process Clause of the Fourteenth Amendment provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.'" *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (quoting U.S. Const. amend. XIV). However, the right to due process at trial is not a guarantee that unreliable evidence will never be admitted. *Id.* at 167. Instead, "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusation." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (quotation, citation, and brackets omitted); *see also Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("The due process clause requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."). Here, the decision of the motion court did not deny Perry that opportunity, and a review of this Court's decisions addressing due process principles demonstrates that although "reliability is the linchpin in determining

the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the state court properly found that reliability must be addressed prior to the admission of identification evidence only when there has been an unnecessarily suggestive identification procedure that has resulted from improper or unfair state action.

In *Neil v. Biggers*, 409 U.S. 188 (1972), this Court summarized its decisions addressing "the scope of due process protection against the admission of evidence deriving from suggestive identification procedures." *Biggers*, 409 U.S. at 198. It said:

> In *Stovall v. Denno*, 288 U.S. 293 (1967), this Court held that the defendant could claim that the "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Id*, at 301-02. This [it] held, must be determined "on the totality of the circumstance." [The Court] went on to find that on the facts of the case then before [it], due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification, as did several police officers present in her hospital room, and also made an in-court identification.
>
> Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:
>
> > [It held] that each case must be considered on its own facts, and that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
>
> *Simmons v. United States*, 390 U.S. 377 (1968).
>
> Again [the Court] found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.

> The only case to date in which this Court has found identification procedures to be violative of due process is *Foster v. California*, 394 U.S. 440, 442 (1969). There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. [The Court] held all of the identifications inadmissible, observing that the identifications were "all but inevitable" under the circumstances. *Id.* at 443.
>
> In . . . *Coleman v. Alabama*, 399 U.S. 1 (1970), [the Court] held admissible an in-court identification by a witness who had a fleeting but "real good look" at his assailant in the headlights of a passing case. The witness testified at a pretrial suppression hearing that he identified one of the petitioners among the participants in the lineup before the police placed the participants in a formal line. Mr. Justice Brennan for four members of the Court stated that this evidence could support a finding that the in-court identification was "entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup." *Id.* at 5-6.

Biggers, 409 U.S. at 196-97 (parallel citations omitted). The Court then said:

> Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of identification is gratuitous. But as Stovall makes clear, the admission of evidence of a showup without more does not violate due process.

Biggers, 409 U.S. at 198 (parallel citations omitted). The Court then found that "unnecessary suggestiveness alone" did not require the exclusion of the evidence. *Id.* at

198-99. It then addressed "the central question, whether under the totality of the circumstance" the identification was reliable even though the confrontation procedure was suggestive." *Id.* It the found that "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

In *Mason v. Brathwaite*, 432 U.S. 98 (1977),[4] the Court considered for the first time "whether the *Biggers* analysis applie[d] to post-*Stovall* confrontations . . . ." *Brathwaite*, 432 U.S. at 107. There, Perry "acknowledge[d] that the procedure [utilized by the police] in the instant case was suggestive (because only one photograph was used) and unnecessary (because there was no emergency or exigent circumstance)." *Id.* at 109 (quotations and citation omitted). Thus, the only issue before the Court was whether it should apply a *per se* approach that "focuse[d] on the procedures employed and require[d] exclusion of the out-of-court identification evidence, without regard to reliability, whenever it ha[d] been obtained through unnecessarily suggested confrontation procedures," or a more lenient approach "that continue[d] to rely on the totality of the circumstances" and "permit[ted] the admission of confrontation evidence

[4] Although Perry and most courts refer to this case as *Mason* in their short citations, Mason was the Commissioner of Corrections, and Brathwaite was the criminal defendant.

if, despite the suggestive aspect, the out-of-court identification possesse[d] certain features of reliability." *Id.* at 110.

The Court said that in making that determination, there were "several interests to be considered and taken into account." *Id.* at 112. The first factor "was the Court's concern with the problems with eyewitness identification." *Id.* This Court found that those problems arose because "[u]sually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress," and "[t]he witness's recollection of the stranger can be distorted easily by the circumstances or by later actions of the police." *Id.* This Court determined that a *per se* exclusionary rule "goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." *Id.* "The second factor [was] deterrence." *Id.* This Court found that "[a]lthough the *per se* approach has the more significant deterrent effect, the totality approach also has an influence on police behavior" because they "will guard against unnecessarily suggestive procedures . . . for fear that their actions will lead to the exclusion of identifications as unreliable." The third factor the court considered was "the effect on the administration of justice." *Id.* It found that "the *per se* approach suffers serious drawbacks" because "it denies the trier of reliable evidence, it may result, on occasion, in the guilty going free." *Id.*

This Court then found that the standard to be applied was "that of fairness as required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 113. It also found that *Stovall* and *Biggers* "did not, singly or together, establish a strict exclusionary

rule or new standard of due process." *Id.* It further noted that Judge Leventhal had correctly "described *Stovall* as protecting an evidentiary interest, and, at the same time, as recognizing the limited extent of that interest in our adversary system." *Brathwaite*, 432 U.S. at 113 (citing *Clemons v. United States*, 408 F.2d 1230, 1351 (D.C. Cir. 1968) (*Leventhal, J.* concurring), *cert. denied*, 394 U.S. 964 (1969)). The Court then "conclude[d] that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations," and that the *Biggers* factors were to be considered. *Id.* at 114. After applying those factors, it could not "say that under all the circumstances of th[at] case there [was] a very substantial likelihood of irreparable misidentification." *Id.* at 116 (quotation and citation omitted).

In *Kirby v. Illinois*, 406 U.S. 682 (1972), this Court held that although "a robbery victim's one-on-one station house identification of an uncounseled suspect shortly after the suspect's arrest was admissible because adversary judicial criminal proceedings had not yet been initiated, ... due process protects the accused against introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois*, 434 U.S. 220, 227 (1977) (citing *Kirby*, 406 U.S. at 690-91).

Then, in *Watkins v. Sowders*, 449 U.S. 341 (1981), this Court addressed whether "a hearing out of the presence of the jury to determine the admissibility of identification evidence" is "required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 345-46. Below, the Court of Appeals for the Sixth Circuit had "ruled that a hearing on the admissibility of identification evidence need not be held outside the presence of the

jury," and "that given the seriousness of the wounds to [the victim], a showup was necessary . . . ." *Id.* at 344 (quotation, citation, and brackets omitted). In this Court, the petitioners contended that because *Jackson v. Denno*, 378 U.S. 368 (1964), "established a *per se* due process right to a hearing outside the presence of the jury whenever a question of the voluntariness of a confession is raised, . . . it follows . . . that a similar hearing must also be required where the propriety of identification procedures has been questioned." *Watkins*, 449 U.S. at 346.

This Court noted that *Jackson* was distinguishable. *Id.* at 346-47. In doing so, it first noted that although "*Jackson* did reject the usual presumption that a jury can be relied upon to determine issues according to the trial judge's instruction," it had done so "because the peculiar problems the issue of the voluntariness of a confession presents." *Id.* at 347 (quotations and citations omitted). It then noted that in *Jackson*, the Court had "pointed out that, while an involuntary confession is inadmissible in part because such a confession is likely to be unreliable, it is also inadmissible even if it is true, because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Id.* (quotation and citation omitted). It then noted that "[t]he Court concluded in *Jackson* that a jury may find it difficult to understand the policy forbidding reliance upon a coerced, but true confession." *Id.* (quotation, citation, and ellipsis omitted). This Court then stated:

> Where identification evidence is at issue, however, no such special considerations justify a departure from the presumption that juries will follow instructions. It is the reliability of identification evidence that

> primarily determines its admissibility. And the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, as the cases before us demonstrate, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence. Thus the Court's opinion in *Manson v. Brathwaite* approvingly quoted Judge Leventhal's statement [in] *Clemons v. United States*, that,
>
> > while identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process.
> >
> > Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Id. at 347-48 (quoting *Brathwaite*, 432 U.S. at 114 n.14 (quoting *Clemons*, 408 F.2d at 1251 (*Leventhal*, J. concurring))). This Court then found that "under our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth." *Watkins*, 449 U.S. at 349. It accordingly "decline[d] . . . to hold that the Due Process Clause of the Fourteenth Amendment inevitably requires the abandonment of the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence." *Id.* It then noted that "[i]n some circumstances, not present [t]here, such a determination may be constitutionally necessary." *Id.*

Several conclusions are apparent from these cases. First, although "reliability is the linchpin in determining the admissibility of identification testimony," *id.* at 114, reliability is at issue only when an identification procedure has been "so *unnecessarily*

suggestive and so conducive to . . . mistaken identification that [the petitioner] was denied due process of law," *Stovall*, 388 U.S. at 302 (emphasis added); *see also Kirby*, 406 U.S. at 690-91 ("due process protects the accused against introduction of evidence of, or tainted by, unreliable pretrial identifications *obtained through unnecessarily suggestive procedures*" (emphasis added)); *Biggers*, 409 U.S. at 198 ("a showup without more does not violate due process"); *Simmons*, 390 U.S. at 384 ("convictions based on eye-witness identification at trial following a pretrial identification will be set aside on [due process grounds] only if the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"; *cf. United States v. Owens*, 484 U.S. 554, 561 (1988) (declining 'to adopt . . . the principle that, because of the mere possibility of suggestive procedures, out-of-court statements of identification are inherently less reliable than other out-of-court statements").

Second, a procedure is not "unnecessarily suggestive" unless there was "no emergency or exigent circumstance" that justified its use. *Brathwaite*, 432 U.S. at 107. This Court uses the terms "emergency" and "exigency" when it is determining whether state actors were justified in taking actions that would normally violate a defendant's constitutional rights. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011) (witness's identification of Bryant was not testimonial because the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency" (quotation and citation omitted)); *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) ("A burning building of course creates an exigency that justifies a warrantless entry by fire officials to

fight the blaze."); *Terry v. Ohio*, 392 U.S. 1, 18 n.15 (1969) ("the scope of [a] particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness"). Persons other than state actors cannot reasonably be expected to apply those concepts. Therefore, an "unnecessarily suggestive identification procedure" must be understood to mean a procedure employed by a state actor when there was no emergency or exigency that justified its use.

Third, when there has been no unnecessarily suggestive identification procedure, the issue of reliability is one for the jury to decide. *See Watkins*, 449 U.S. at 349 (no need for hearing outside the presence of the jury on the reliability of identification testimony where there was no unnecessarily suggestive procedure); *cf. Simmons*, 390 U.S. at 384 (this Court was unwilling to ban the practice of identification by photograph where "[t]he danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error").

Fourth, in each of the identification cases addressed by this Court, the police had caused or orchestrated the suggestive procedure at issue. *See Watkins*, 449 U.S. at 343 (police officer "had taken Watkins to be identified at the hospital"); *Brathwaite*, 432 U.S. at 101 (officer had left a single picture of Brathwaite on the witness's desk); *Biggers*, 409 U.S. at 380 (two detective conducted a "showup" and "walk[ed] respondent past the victim"); *Simmons*, 390 U.S. at 381 (FBI agents showed witnesses photographs of Simmons and his co-defendant); *Stovall*, 388 U.S. at 295 (Stovall "was handcuffed to one of five police officers who, with two members of the staff of the District Attorney,

Therefore, this Court's decisions addressing due process protections in that context are applicable here. In fact, those cases are instructive.

In *Connelly*, this Court noted that "coercive government misconduct was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*, 297 U.S. 278 (1936)," that it had "retained this due process focus, even after holding, in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States," and that "the cases considered by this Court over the 50 years since *Brown v. Mississippi* ha[d] focused on the *crucial element* of police overreaching." *Connelly*, 479 U.S. at 163 (1986) (parallel citations omitted). It then held: "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* This Court then rejected the lower court's finding that although "the police committed no wrongful acts," "sufficient state action was present by virtue of the admission of the [the severely mentally ill defendant's] confession into evidence in a court of the State." *Id.* at 165. In doing so, it held that "[t]he purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the constitution." *Id.* at 166. It also held that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Id.* It further held that although "[a] statement rendered by one in the condition of [Connelly] might be proved to be quite unreliable, . . . this is a matter to be governed by the evidentiary laws of the forum, *see, e.g.*, Fed. Rule Evid. 601, and not the Due Process Clause of the Fourteenth Amendment"

because "'[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'" *Id.* at 167 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Therefore, contrary to Perry's claim, this Court's decision in *Connelly* was not dependent on the deterrent effect of the exclusionary rule. Accordingly, the state court's conclusion "that the *Biggers* analysis does not apply to a *potentially* suggestive out-of-court identification where there is a complete absence of *improper* state action," Pet. App. A2 (quotation and citation omitted and emphasis added), does not conflict with, and is a logical extension of, the due process principles recognized by this Court.

II. THERE IS NO SIGNIFICANT SPLIT OF AUTHORITY ON THIS ISSUE BECAUSE ONLY A SMALL MINORITY OF COURTS HAVE APPLIED DUE PROCESS PRINCIPLES TO IDENTIFICATION PROCEDURES THAT WERE NOT ORCHESTRATED BY STATE ACTION.

Perry argues that "[i]n declining to follow precedents of the First Circuit Court of Appeal, the New Hampshire Supreme Court acted contrary to the principles established by this Court in *Stovall*, *Manson*, and *Biggers*." Pet. 17 (citing *United States v. DeLeon-Quiñones*, 588 F.3d 748 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 2361 (2010); *United States v. Bouthot*, 878 F.2d 1506 (1st Cir. 1989)). In *Bouthot*, the court held:

> The *Connelly* logic does not apply to this case. Whereas coerced confessions may violate an independent constitutionally protected interest, the suggestive identification of a suspect *per se* does not violate any constitutionally protected interest. In the latter scenario, a constitutional violation, if any, occurs only when testimony regarding the suggestive pretrial identification (or an in-court identification based upon it) is introduced at trial. Whereas a coerced confession is suppressed primarily to deter future violations of the Constitution, overly suggestive identifications are suppressed primarily to avoid an unfair trial. In the latter scenario, the Due Process Clause protects an evidentiary interest:

suggestive encounter was not the result of "intentionally wrongful police conduct," *id.* at 222, it also found that it "was a result of the state's negligent exercise of its control over both the witness and the accused," *Id.* at 223. In an earlier case, that court had also held that "police assistance in the pretrial publicity distinguishe[d that] case from *United States v. Peele*, 574 F.2d 489, 491 n.1 (9th Cir. 1978) ('We are not presented with a case where the police may have assisted or encouraged the pretrial publicity.'))." *United States v. Paaaina*, 43 F.3d 1480, 1994 WL 703015, at *2 n.1 (9th Cir. 1994) (table case). In *Peele*, the court had held that because "there [was] no government involvement at all in the suggestive identification procedure, . . . the balancing test under *Stovall* and *Simmons* [was] not applicable." *Peele*, 574 F.2d at 491. However, it also held that "[a] case might arise where the mind of a witness [was] so clouded by suggestions from nongovernmental sources that a conviction based principally on the testimony of that witness violates due process . . . ." *Id.* Therefore, it cannot be said that the Court of Appeals for the Ninth Circuit has held that due process principles require a judge to determine the reliability of an unnecessarily suggestive identification procedure that was not caused by any unfair state action.

Moreover, although Perry is correct that "[t]he tenth circuit has also applied due process principles to claims that suggestive circumstances, such as newspaper photos, led to an unreliable identification even though the circumstances were not the product of state action," Pet. 21, in those cases, the court was not asked to, nor did it, decide whether state action was a necessary prerequisite to a due process claim. *See United States v. Elliot*, 915 F.2d 1455, 1457 (10th Cir. 1990), *cert. denied*, 503 U.S. 996 (1992); *United*

States v. Milano, 443 F.2d 1022, 1025 (10th Cir. 1971), *cert. denied*, 404 U.S. 943 (1971). In addition, in *Milano*, the court said that it was "unwilling to make a *per se* rule that such photographs indelibly taint subsequent identification" because doing so "might require [it] to tread on delicate First Amendment ground," and because it "hesitate[d] to discourage law enforcement agencies from releasing pictures of wanted suspects to the press in order to obtain the public's help in apprehending them." *Id.* at 1025. Therefore, those cases do not support Perry's position. Accordingly, there is no significant split of authority on this issue.

III. THE FACTS OF THIS CASE ARE SUCH THAT IT DOES NOT PROVIDE A PROPER VEHICLE TO RESOLVE THIS ISSUE.

Perry argues that his "case presents the kind of unreliable eyewitness identification evidence should be addressed according to the due process principles recognized by this Court" because "Blandon's identification of [him] would have been barred from trial had the lower courts found that due process applied and engaged in the two-part analysis required by this Court." Pet. 15. That claim is contrary to the record.

Here, there was no "unnecessarily suggestive identification procedure." When Officer Clay arrived at West Hollis Street, she parked her cruiser in front of the building and walked to the parking lot. MH 8–9, 12. She then encountered Perry carrying some of the stolen property. MH 39. He claimed that "kids" who had just left the area had stolen that property and that he was just moving it, and he provided a description of one of those kids and said that the other one would be on Ash Street. MH 10–11. He then pointed toward a man on Ash Street and said that the man had been in the parking lot.

MH 11. Officer Clay spoke to that person, but he denied being involved. MH 11–12. While they were talking, Perry "kept saying that he had just found the amplifiers and that other kids had stolen them." MH 12.

When Officer Clay and Perry walked back in to the parking lot, Clavijo walked over and said he had found out through a neighbor that his car had been broken into. MH 12. Officer Clay asked Officer Dunn "to stay with Mr. Perry because it was an ongoing investigation and [they] needed to make sure [they] had all parties that had knowledge of the situation to remain on scene until [they] figured out what was going on." MH 13. Perry was just standing there and he was not handcuffed or restrained in any way, MH 10–11, 14. At that time, the officer did not know that there was an eyewitness. MH 45.

Officer Clay spoke to Blandon in the hallway where neither of them could see the parking lot or Perry. MH 14, 17. Officer Clay never pointed out Perry to Blandon or indicated in any way that there was a suspect. MH 14. She merely asked Blandon to describe what she had seen. MH 18. Blandon then said that she had seen a tall, black man, MH 30, "walk and look into all of the cars in the parking lot and that he then circled Mr. Clavijo's car," opened the trunk, and removed a large item, MH 24–25. She also said she had seen him "carrying a bat." MH 25. Officer Clay asked for a more specific description, and Blandon said "it was the man that was in the back parking lot standing with the police officer." MH 18. As she did, "[s]he kind of went back into her apartment and pointed towards the window to show . . . that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot." MH 18. Therefore, the officers had not conveyed that Perry was a suspect.

Furthermore, as demonstrated above, Blandon's seeing Perry with an officer was neither intentional nor preventable because the police did not know that she was in a position to see Perry at that time. Therefore, there was no unnecessarily suggestive identification procedure.

In any event, an application of the *Biggers* reliability factors demonstrates that, even assuming that there had been an unnecessarily suggestive identification procedure, the factors favoring reliability clearly outweighed any possible minimal suggestiveness caused by Officer Dunn merely standing with an unrestrained Perry in the parking lot. First, Blandon had a good opportunity to view Perry because she watched him commit the crime in a parking lot that was lit up by lights in the parking lot, lights on the building, and streetlights on Ash Street. MH 25–26. Although Officer Clay speculated that the actions described by Blandon could have taken as little as a couple of minutes to occur, she also said that there were twelve to fifteen cars in the parking lot. MH 25. Therefore, it is reasonable to conclude that she had watched him for an even longer amount of time.

Second, Blandon had to have paid a great deal of attention to what Perry was doing because she described the actions he took in detail: walking around the parking lot looking into cars, circling Clavijo's car, opening Clavijo's trunk, removing a large item, and carrying a bat. MH 24, 36. Those descriptions were demonstrably accurate where Officer Clay testified that she had seen Perry carrying the amplifiers, that Clavijo had said that two amplifiers and a large wooden box with two speakers had been taken from

the trunk of his car, and that she had found the box and amplifiers near the car. MH 9–10, 30, 36–37, 39.

Third, Perry accurately described the person whom she had seen as a tall, black man, MH 30, and Perry is a black man who is over six feet tall.[6] Although Perry makes much of the fact that Blandon could not later identify him in a photographic lineup, Blandon saw Perry from an upstairs window, so she could not have been expected to have seen his facial features clearly enough to have been able to distinguish them from those of other persons with similar features. MH 29.

Fourth, Blandon's level of certainty was unequivocal. Although she was not asked how certain she was of her identification, she had immediately stated that the person she had seen breaking into cars was the man with the officer, who was Perry. MH 24.

Fifth, the identification was made within a matter of minutes after she observed Perry committing the offense. *See Biggers*, 409 U.S. at 199-200 (a delay of seven months "would be a seriously negative factor in most cases"). Therefore, because there was no "substantial likelihood that there was an irreparable misidentification," this is not one of those "extraordinary cases" where identification evidence should have been taken from the jury. *DeLeon-Quiñones*, 588 F.3d at 753 (quotation and citation omitted).

Accordingly, this Court should deny the petition because the state court's decision does not conflict with, and is a logical extension of, the due process principles recognized

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[6] Although no testimony about Perry's height was admitted at the suppression hearing, he testified at trial that he is 6' 2" tall, JT-II 224, and the fact that he was tall would have been obvious to the court at the suppression hearing.

by the Court; because there is no significant split of authority; and because, even if no unfair state action was required, there was no "unnecessarily suggestive" identification procedure, and the identification was nevertheless reliable.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the New Hampshire Supreme Court in *State v. Perry*, No. 2009-0590 (N.H. Nov. 18, 2010) (unpublished opinion).

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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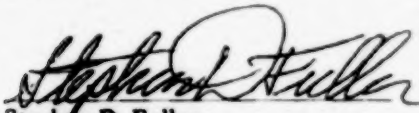
Attorney General



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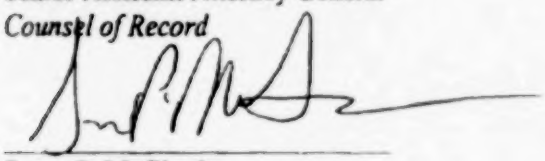

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April 25, 2011

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REPLY BRIEF

Supreme Court, U.S.
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No. 10-8974

SUPREME COURT OF THE UNITED STATES

BARION PERRY
Petitioner

v.

STATE OF NEW HAMPSHIRE
Respondent

On Petition For Writ Of Certiorari
To The New Hampshire Supreme Court

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The State's brief in opposition endeavors to explain why this Court should not decide whether the Due Process Clause provides safeguards against all unreliable eyewitness identifications or only those unreliable identifications created by state action. The State's argument follows one line of authority but dismisses an equal, if not more substantial, line of authority as the "minority" view. The State then concludes that it has correctly answered a question never addressed by this Court and that the petition for certiorari should be denied.

The First Circuit Court of Appeal and five other federal courts of appeal are not, in any meaningful sense, a "minority." Moreover, if the answer to the question were obvious, those courts would not have, contrary to the State's position, found due process protections to be applicable regardless of whether a state actor's improper conduct produced the identification.

Even the New Hampshire Supreme Court, which denied petitioner's claim, has recognized the need for this Court to address the question presented. The court rejected petitioner's assertion that due process protects against the use of unreliable eyewitness identification evidence regardless of whether the evidence is the product of improper police conduct. Pet. App. 1-2. The court noted that First Circuit law supports petitioner's claim but rejected the First Circuit's views as well. Pet. App. 2. The court's two page opinion relied on its earlier opinion, *State v. Addison*, 160 N.H. 792 (2010)[1], where the court explained:

> Although the First Circuit interprets the *Biggers* test to offer the defendant greater protection under the Federal Constitution than our State Constitution, First Circuit decisions are not binding upon this court even on questions of federal law. *See Martineau v. Perrin*, 119 N.H. 529, 531 (1979). "This State court authority is based upon the parallel position of State and lower federal courts." *Id.* **Until the United States Supreme Court has ruled on whether state action is a prerequisite to the *Biggers* test, this court and the First Circuit have parallel authority in passing on federal constitutional questions**. *Id.*

[1] *Addison v. New Hampshire*, No. 10-8527, raises the same issue presented here and is scheduled for conference May 12, 2011.

Addison, 160 N.H. at 802-03 (emphasis added). In other words, the New Hampshire Supreme Court recognized that until this Court answers the question, parallel and conflicting case law will persist.

Petitioner addresses specific arguments of the brief in opposition as follows:

The State of New Hampshire Wrongly Minimizes The Split In Authority

The State argues that "there is no significant split in authority" because "only a small minority of courts have applied due process principles to identification procedures that were not orchestrated by police action." Brief in Opposition 25. That statement is incorrect. Most federal circuit court opinions addressing the issue contradict the State's position and the New Hampshire Supreme Court's ruling against petitioner.

The First, Second, Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeal have recognized that a due process challenge to unreliable eyewitness identification evidence does not depend on a showing of improper conduct by a state actor.[2] *See United States v. De León-Quiñones*, 588 F.3d 748, 754-56 (1st Cir. 2009) ("'federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police'")(*quoting United States v. Bouthot*, 989 F.2d 1506, 1515-16 (1st Cir. 1989)); *Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998), *cert. denied*, 525 U.S. 840 (1998) ("the linchpin of admissibility, therefore, is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable"); *Thompson v. Mississippi*, 914 F.2d 736, 739 (5th Cir. 1990), *cert. denied*, 498 U.S. 724 (stating that even in the absence of state action "'a court must scrutinize any pretrial confrontation for possible due process violations'"

[2] These and other federal cases are discussed at length in Perry's Petition for Certiorari, 17-21.

(*quoting United States v. Thevis*, 665 F.2d 616, 643 (5th Cir.1982)[3]; *Thigpen v. Cory*, 804 F.2d 893, 895-97 (6th Cir. 1986)("deterrence of police misconduct is not the basic purpose for excluding identification evidence"); *Green v. Loggins*, 614 F.2d 219, 222-23 (9th Cir. 1980)("a court is obligated to review every pretrial encounter, accidental or otherwise, in order to insure that the circumstances of the particular encounter have not been so suggestive as to undermine the reliability of the witness' subsequent identification"); *United States v. Elliot*, 915 F.2d 1455, 1457 (10th Cir. 1990)(applying due process principles to an in-court identification by a witness who had seen a photo of the defendant in a newspaper).

The brief in opposition wrongly minimizes the weight of this authority. The State quotes the First Circuit but does not discuss that court's explicit rejection of the theory offered by the State. Similarly, the State merely cites the Second and Sixth Circuit cases with no discussion and would accord no weight to the opinions from the Ninth and Tenth Circuits, even though both of those courts applied due process principles to identifications not involving improper police conduct. In contrast to the brief in opposition, federal district courts have recognized the predominant federal view that the "circuit courts that have addressed the issue after *Brathwaite* have determined that identification testimony is subject to due process scrutiny whether or not the alleged unduly suggestive procedure is caused by state action." *Owens v. Ortiz*, 2007 U.S. Dist. LEXIS 98206, 2007 WL 6030392, 25-26 (D.Colo. 2007).

Against the weight of federal authority, the brief in opposition cites a number of state court opinions which the State terms a "majority." These references are, by and large, correct regarding the holdings of those state court cases. However, the contrast between state and federal lines of authority makes petitioner's point that review by this Court is needed. The

[3] Petitioner did not cite Fifth Circuit authority in the petition for certiorari but now adds the Fifth Circuit to the list of circuits siding with his view.

conflict between state and federal courts over a question never addressed by this court is precisely why the petition for certiorari should be granted. The lower courts will continue to struggle with the issue until this court settles it. *See, e.g., People v. Padilla*, 2010 Cal. App. Unpub. LEXIS 8644, 21 (Nov. 2010) (unpublished) ("There is a split of authority as to whether, in the identification context, some sort of state action is required before constitutional due process rights can be implicated."). *See also* Imwinkelried, *et al*, *Courtroom Criminal Evidence*, §2815 at 1310, 1310 n. 117 (4th Ed. 2005)("The courts are split on whether the exclusionary rule will apply to a due process violation [regarding identification evidence] if there is no police action," and "[t]his issue deserves resolution by the Supreme Court.").

The Brief In Opposition Fails To Acknowledge That The Two Competing Lines Of Authority Are Based On Opinions From This Court

The State's brief discusses virtually every opinion from this Court addressing due process and eyewitness identification evidence. However, upon reaching the issue actually presented by the petition, and finding no case from this Court on point, the brief in opposition turns to *Colorado v. Connelly*, 479 U.S. 157 (1986), which is a confession case. According to the State, since *Connelly* says due process does not bar unreliable confession evidence unless it is the product of state actors, the same reasoning should apply in this context so that due process does not bar unreliable identification evidence which is not the product of state actors. This "*Connelly* argument" is the basis of the line of authority found primarily in state court opinions.

The line of authority found in federal court opinions expressly rejects the *Connelly* argument. The federal view relies on this Court's statements that, "it is the likelihood of misidentification which violates a defendant's right to due process and which is the basis of the exclusion of evidence," *Neil v. Biggers*, 409 U.S. 188, 198 (1972), and that "[r]eliability is the

linchpin in determining the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). As explained by the First Circuit, the language from this Court's eyewitness identification cases shows that the *Connelly* argument is wrong.

> The *Connelly* logic does not apply to this case. Whereas coerced confessions may violate an independent constitutionally protected interest, the suggestive identification of a suspect *per se* does not violate any constitutionally protected interest. In the latter scenario, a constitutional violation, if any, occurs only when testimony regarding the suggestive pretrial identification (or an in-court identification based upon it) is introduced at trial. Whereas a coerced confession is suppressed primarily to deter future violations of the Constitution, overly suggestive identifications are suppressed primarily to avoid an unfair trial. In the latter scenario, the Due Process Clause protects an evidentiary interest: reliability.

Bouthot, 878 F.2d at 1515-16 (citations omitted).

The *Connelly*/deterrence rationale favored by the State conflicts with the reliability rationale followed by federal courts of appeal. Thus, the state / federal split of authority on the question derives from competing interpretations of leading cases from this Court. The states that follow the *Connelly* rationale do so in spite of the direction given by this Court in *Neil v. Biggers*, *Manson v. Brathwaite*, and other eyewitness identification cases. This is the kind of split in authority, based on alternative readings of this Court's case law, which justifies review by this Court.

The Brief In Opposition Improperly Raises Factual Issues

The State argues that the factual circumstances in this case do not provide a proper vehicle for review by this Court. The State then cites to the trial transcript of the case to argue that "there was no 'unnecessarily suggestive identification procedure.'" Brief In Opposition 28. However, that factual issue would not be before the Court if certiorari were granted because the New Hampshire Supreme Court never addressed those facts. Instead, the court noted that "the

witness's identification was not derived from any suggestive technique employed by the police," and on the basis of that fact alone the court rejected petitioner's due process claim as being unsupported by the law. Thus, review by this Court would be limited to the question of law decided by the New Hampshire Supreme Court and set forth in the petition for certiorari.

Under The Current Case Law, An Important Federal Constitutional Right Expands Or Contracts Based Solely On Where A Criminal Defendant Is Prosecuted

The reliance of the brief in opposition on state case law reveals the practical consequences of the split in authority. In many jurisdictions, the scope of a criminal defendant's federal constitutional right to mount a due process challenge to eyewitness identification evidence will vary depending on whether the defendant is charged in state court or federal court.[4] In most federal courts, a defendant who challenges unreliable eyewitness identification evidence will not be required to demonstrate state action or improper police conduct. The federal criminal defendant will receive the protections established by *Neil v. Biggers* and *Manson v. Brathwaite*. However, in state courts in those same jurisdictions, a criminal defendant challenging the same evidence will not have the same federal constitutional right. The state court defendant will be

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[4] Categorizing state and federal cases by circuit illustrates the point.

First Circuit (state action not required): *Bouthot*, 878 F.2d 1506; *De León-Quiñones*, 588 F.3d 748. New Hampshire, Rhode Island, Massachusetts, and Maine (state action required): *Addison*, 160 N.H. 792; *Pailon*, 590 A.2d 858; *State v. Bertram*, 591 A.2d 14, 25-27 (R.I. 1991); *Commonwealth v. Colon-Cruz*, 562 N.E.2d 797 (Mass. 1990); *State v. Naoum*, 548 A.2d 120, 124-45 (Me. 1988).

Second Circuit (state action not required): *Dunnigan*, 137 F.3d 117; *Richardson v. Superintendent*, 621 F. 3d 196 (2d Cir. 2010). New York (state action required): *People v. Marte*, 912 N.E.2d 37, 39-40 (N.Y. 2009).

Fifth Circuit (state action not required): *Thompson*, 914 F.2d 736. Louisiana (state action required): *State v. Birch*, 956 So 2d 793, 800 (La. App. 2007).

Sixth Circuit (state action not required), *Thigpen*, 804 F.2d 893. Ohio, Tennessee, and Kentucky (state action required): *State v. Brown*, 528 N.E.2d 523, 533 (Ohio 1988); *State v. Reid*, 91 S.W.3d 247 (Tenn. 2002); *Wilson v. Commonwealth*, 695 S.W.2d 854, 856-58 (Ky. 1985).

Ninth Circuit (state action not required): *Green*, 614 F.2d 219. California (state action required): *People v. Peggese*, 102 Cal.App. 3d 415, 422 (1980).

Tenth Circuit (state action not required): *Elliot*, 915 F 2d 1455; *Milano*, 443 F 2d 1022. Colorado (state action required): *People v. Owens*, 97 P.3d 227, 233-34 (Colo.App. 2004). *See also, Owens*, 2007 U.S. Dist. LEXIS 98206, noting that the defendant would have due process protections as a defendant in a federal criminal case but did not in the state court proceedings he challenged as a habeas petitioner.

protected by the Due Process Clause only if he can show that the police or some other state agent acted improperly.

Thus, a defendant's federal constitutional right to due process expands and contracts depending on where he faces trial. The defendant challenging eyewitness identification evidence in Merrimack County Superior Court in Concord, New Hampshire, does not have the same right he would have if he faced charges one mile away in the United States District Court for New Hampshire. The scope of an important federal constitutional right should not vary depending on where the defendant is charged. Without action by this Court, the competing lines of authority will persist, as will the practical effects of the inconsistent case law.[5]

CONCLUSION

This case is one of two pending New Hampshire cases which raise the same question.[6] Together, the cases provide this Court the appropriate opportunity to resolve an important federal constitutional question. Even though the two cases are factually quite different, they present the same pure question of law which was determinative of the outcome. Furthermore, the fact that the issue arose twice in a short period of time in New Hampshire is confirmation, in addition to the recognized split in authority, that the issue is one in need of resolution. This is especially true within New Hampshire and the First Circuit where the contradiction between state and federal interpretations of federal constitutional law is expressly acknowledged.

Finally, this is an issue which affects criminal trials regularly. Eyewitness identification evidence is used every day across the country. The due process principles regulating the

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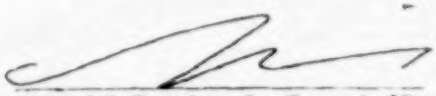
[5] As described in the original petition, state court defendants who attempt to assert their federal due process claims in habeas petitions have been denied relief by the federal courts, under AEDPA, because this Court has not resolved the split in authority. Petition for Certiorari 21, n. 3.

[6] The other case is *Addison v. New Hampshire*, described at p. 1 and n. 1.

admission of such evidence should be clear and consistent. At present they are not. If the presentations of the parties show anything, it is that no one really knows whether this Court requires state action before the due process protections against unreliable eyewitness identification will apply. Petitioner respectfully submits that the Court should answer that question.

For all of the foregoing reasons, petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted this 29th day of April, 2011,



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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

JUAN SMITH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Juan Smith respectfully requests leave to proceed *in forma pauperis*. Smith was declared indigent by the Judicial District Court of Orleans Parish, Louisiana. His affidavit demonstrating indigence is attached. Pursuant to Sup. Ct. R. 39(1), Petitioner therefore moves to proceed with the filing of his Petition for Writ of Certiorari *in forma pauperis*.

Respectfully submitted,

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Attorney for Petitioner

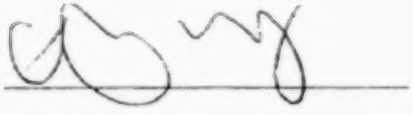
*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have served Petitioner's Motion to Proceed In Forma Pauperis upon counsel for opposing party, by depositing a copy of same by means of U.S. Mail, and sending it to the following address:

Donna Andrieu, Assistant District Attorney
Orleans Parish District Attorney's Office
1340 Poydras St., Suite 700
New Orleans, LA 70112

This 16 day of December, 2010.



*Kathleen Kelly, LA Bar Roll # 25433
Capital Post-Conviction Project of Louisiana
1340 Poydras Street, Suite 1700
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Telephone: (504) 212-2110
Facsimile: (504) 212-2130
Attorney for Petitioner

*Counsel of Record

AO 240 (Rev. 06/09) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

UNITED STATES DISTRICT COURT

for the

Eastern District of Louisiana

Juan Smith
Plaintiff

v.

Burl Cain
Defendant

Civil Action No.

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS
(Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: Louisiana State Penitentiary.
If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are:
N/A

My gross pay or wages are: $ 0, and my take-home pay or wages are: $ 0 per
(specify pay period) N/A

3. *Other Income.* In the past 12 months, I have received income from the following sources *(check all that apply)*:

(a) Business, profession, or other self-employment	☐ Yes	☒ No
(b) Rent payments, interest, or dividends	☐ Yes	☒ No
(c) Pension, annuity, or life insurance payments	☐ Yes	☒ No
(d) Disability, or worker's compensation payments	☐ Yes	☒ No
(e) Gifts, or inheritances	☐ Yes	☒ No
(f) Any other sources	☐ Yes	☒ No

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

4. Amount of money that I have in cash or in a checking or savings account: $ 103.38

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instruments or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:

N/A

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:

N/A

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

N/A

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:

N/A

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: 10-6-18

X Juan Smith
Applicant's signature

Juan Smith
Printed name

STATEMENT OF ACCOUNT

(Certified Institutional Equivalent)

I hereby certify that Juan Smith, inmate number 376126

the Plaintiff herein has the following sums of money on account to his credit at LOUISIANA STATE PENITENTIARY,

Angola, Louisiana 70712, the institution where he is confined:

Prison Drawing Account: $ 103.38

Prison Savings Account: $ 0.00

A. Cash $ unknown

B. Bonds $ unknown

I further certify that the average monthly deposits for the preceding six months is $ 52.50.

(The average monthly deposits are to be determined by adding the deposits made during a given month and dividing that total by the number of deposits made during that month. This is repeated for each of the six months. The average from each of the six months are to be added together and the total is to be divided by six).

I further certify that the average monthly balance for the preceding six months is $ 53.30.

(The average monthly balanced is to be determined by adding each days balance for a given month and dividing that total by the number of days in that month. This is to be repeated for each of the six months. The balance of the six months are to be added together and the total is to be divided by six).

10/4/2010
Date Certified

DATE

Andrea B. Carney
Signature of Authorized Officer of Institution

OCT - 4 2010

CERTIFIED

I/B-6

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
CORRECTIONS SERVICES
INMATE WITHDRAWAL REQUEST

DNV
MC 2-10-04

DOC NUMBER	NAME (LAST NAME, FIRST NAME, INITIAL)
376126	Smith, Juan

LIVING QUARTERS	DATE OF REQUEST MO.	DAY	YEAR	OFFICE USE ONLY
Death Row L-B	2	9	04	

WRITTEN AMOUNT _____ DOLLARS

TOTAL AMOUNT $ 3.85

YOU MUST ATTACH A STAMPED, ADDRESSED ENVELOPE FOR ALL OUTSIDE MAIL

PAY TO THE ORDER OF:

VENDOR NO. | SAVINGS ACCT. NO.

NAME General Fund

ADDRESS L.S.P.

CITY Angola | STATE LA | ZIP 70712

☐ REQUEST DENIED. REASON: _____

INMATE SIGNATURE Juan Smith

RIGHT THUMB PRINT

VERIFIED BY: _____ TITLE: _____

APPROVED BY: Ruth Speer TITLE: CSII

DRAWING ACCOUNT

Code		
73	☐	Send Money to Inmate Club.
74	☑	Inmate Withdrawal - See Dept. Reg. 40-18 Purpose: Indigent
74	☐	U.S. Savings Bond
82	☐	Miscellaneous Explanation: _____

SAVINGS ACCOUNT

Code		
94	☐	U.S. Savings Bond
79	☐	Court Cost
82	☐	Education

Check Number _____ Date _____

NOTE: Print name and address of payee in box at right. Attach necessary documents including a stamped self-addressed envelope for all outside mail.

I/B-6

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
CORRECTIONS SERVICES
INMATE WITHDRAWAL REQUEST

MC 2-10-04

DOC NUMBER	NAME (LAST NAME, FIRST NAME, INITIAL)
376124	Smith, Juan

LIVING QUARTERS	DATE OF REQUEST MO.	DAY	YEAR	OFFICE USE ONLY
Death Row L-B	2	9	04	

WRITTEN AMOUNT _____ DOLLARS

TOTAL AMOUNT $ 3 | 8.5

YOU MUST ATTACH A STAMPED, ADDRESSED ENVELOPE FOR ALL OUTSIDE MAIL.

PAY TO THE ORDER OF:

VENDOR NO. | SAVINGS ACCT. NO.

NAME General Fund

ADDRESS LSP

CITY Angola | STATE LA | ZIP 70712

☐ REQUEST DENIED. REASON: _____

INMATE SIGNATURE Juan Smith

RIGHT THUMB PRINT

VERIFIED BY: _____ TITLE: _____

APPROVED BY: Beth Sycs CAT TITLE: _____

Code **DRAWING ACCOUNT**

73 ☐ Send Money to Inmate Club.

74 ☑ Inmate Withdrawal - See Dept. Reg. 46-18
Purpose: Indigent

74 ☐ U.S. Savings Bond

82 ☐ Miscellaneous
Explanation: _____

Code **SAVINGS ACCOUNT**

94 ☐ U.S. Savings Bond

79 ☐ Court Cost

82 ☐ Education

Check Number _____ Date _____

NOTE: Print name and address of payee in box at right. Attach necessary documents including a stamped self-addressed envelope for all outside mail.

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUL 30 2011
OFFICE OF THE CLERK

No. 10-8974

RECORD
V AND
BRIEFS

IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

JOINT APPENDIX

RICHARD GUERRIERO
PUBLIC DEFENDER
Counsel of Record for Petitioner
N.H. APPELLATE DEFENDER PROGRAM
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PETITION FOR CERTIORARI FILED FEBRUARY 11, 2011
CERTIORARI GRANTED MAY 31, 2011

236529

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APPENDIX A — RELEVANT DOCKET ENTRIES

HILLSBOROUGH COUNTY SUPERIOR COURT SOUTH, DOCKET ENTRIES IN FILE

STATE v. Barion Perry

Case No. 08-S-1797

10/22/08	Indictment – TBUT	
10/28/08	Appearance form Melissa Kowalewski, Esq.	
10/31/08	ENGP -	
10/31/08	FA	
11/05/08	NEA/NL -Melissa Kowalewski	-Groff, J.
11/10/08	BAIL ORDER	-Lynn, J.
12/09/08	Corporate Surety Bond $5000.00	-B.D. 6/18/09
12/29/08	St's Witness List	
02/06/09	Parties Agreement	-Groff, J.
02/06/09	Deft's Waiver of Speedy Trial	-Groff, J.
02/20/09	M/to Suppress	
02/20/09	M/to Sequester	
02/20/09	M/for Alt. Juror & Notice of Depleted panel	
02/20/09	M/to Exclude in-court ID	

Appendix A

03/02/09	ST's Obj to Deft's M/to Suppress
03/02/09	ST's Obj to Deft's M/to Exclude in-court ID
03/04/09	M/to extend deadlines -Lynn, J.
03/11/09	State's memorandum of law re: obj to motion to suppress
03/11/09	State's memorandum of law re: obj to motion to exclude
03/24/09	State's Assented to motion to continue 3/31/09 suppression -Groff, J.
04/24/09	TMCO
04/28/09	ORDER ON DEFT'S MOTION TO SUPPRESS -Sullivan, J.
05/11/09	St's M/to revoke bail & request for expedited hrg -Wdr 6-4-09
05/20/09	Deft's Obj to St's M/to revoke Bail
06/03/09	Agreement re: TMC -Barry, J.
06/11/09	State's Motion to continue 6/16/09 trial/Date certain -withdrawn 6/12/09
06/16/09	State's M/to amend indictment or Strike Superfluous language -Lynn, J.
06/16/09	Deft's Stipulation -- prior convictions
06/17/09	ORDER (Re: Guilty verdict/ PSI to be prepared) -Lynn, J.

Appendix A

07/23/09	Def's Sentencing memorandum
07/27/09	sentence sheet -Barry, J.
07/27/09	mittimus
07/28/09	ROMF
07/28/09	Def's Assented to motion for services - CD recording of trial -Barry, J.
07/28/09	604A: CD - $25 -Barry, J.
07/28/09	Def's Assented to motion for services - Transcript of sent. -Barry, J.
07/28/09	604A: Rand reporting - $498.00 -Barry, J.
08/04/09	Def's Application for Sentence Review -7/23/10 withdrawn
08/17/09	Def's Notice of Appeal to Supreme Court (2009-0590)
09/21/09	Supreme Court order re: case accepted, order transcript
09/25/09	CD of transcript of 7/27/09 sentencing hearing
09/22/09	Def's motion to amend mittimus -Barry, J.
09/29/09	State's notice of no objection to motion to amend
10/02/09	Notice of amendment to sentence (blueform)

Appendix A

10/13/09	Return of Blue Form
07/23/10	Ltr - Sentence Review application withdrawn
11/19/10	Supreme Court order re: affirmed (2009-0590)
12/8/10	Supreme Court Certificate - affirmed (2009-0590)

HILLSBOROUGH COUNTY
SUPERIOR COURT SOUTH,
DOCKET ENTRIES IN COMPUTER SYSTEM

State v. Barion Perry

Type: Criminal

Case No. 226-2008-CR-01797

10/31/08	Arraignment Comment: Entry of not guilty form filed
11/10/08	Bail Hearing
02/06/09	Trial Management Conference
02/17/09	Jury Trial Continued
03/31/09	Hearing-Motion to Suppress Continued to 4/20/09

Appendix A

03/31/09	Hearing on Motion to Exclude Continued to 4/20/09
04/20/09	Hearing on Motion to Exclude
04/20/09	Hearing-Motion to Suppress
04/24/09	Trial Management Conference
05/04/09	Jury Trial Continued
06/05/09	Trial Management Conference Agreement - No Hearing Necessary
06/08/09	Hearing-Motion to Revoke Bail Withdrawn
06/15/09	Jury Trial (Judicial Officer: Lynn, Robert J) Date Sched: 6/8/2009
06/15/09	Jury Selection (Judicial Officer: Lynn, Robert J)
06/16/09	Jury Trial (Judicial Officer: Lynn, Robert J) Memo: TC 1 1/2 days, BU to Chavez and Fleming
07/27/09	Sentencing Hearing Scheduled (Judicial Officer: Barry, James J., Jr.)

Appendix A

NEW HAMPSHIRE SUPREME COURT DOCKET ENTRIES

Case No. 2009-0590
State of New Hampshire v. Barion Perry

08/18/2009	Notice of appeal filed (Melissa A. Kowalewski)
08/18/2009	Motion to waive filing fee (Melissa A. Kowalewski)
08/18/2009	Motion to withdraw as counsel and appoint new counsel on appeal (Melissa A. Kowalewski)
08/18/2009	Financial affidavit and application for court appointed counsel (Melissa A. Kowalewski)
08/20/2009	Correspondence re docket assignment.
09/16/2009	APPELLATE DEFENDER APPOINTED AS COUNSEL (Duggan, J.)
09/18/2009	Acceptance and transcript order.
09/18/2009	Transcript order transmittal form
11/19/2009	Transcripts filed, 5 vols. (4-20-09, 6-15-09, master index, 6-16-09, 6-17-09) over 100 pgs., complete.
11/23/2009	Stmt for services other than counsel (transcripts) for $1,161.00 approved by Duggan, J., forwarded to Judicial Council for payment.

Appendix A

11/30/2009	Briefing Order
12/18/2009	Correspondence assigning case to Alexander Parsons, Public Defender (Christopher M. Johnson)
01/15/2010	Defendant's assented-to notice of automatic extension of time to file brief (Alex Parsons).
01/19/2010	Brief now due 2/16/2010; opposing brief now due 4/19/2010.
02/16/2010	Brief and appendix for the defendant filed (Alex Parsons). Atty. Parsons request 5 minutes 3JX oral argument.
03/12/2010	Correspondence assigning case to Susan P. McGinnis (Mary C. Evans, AG).
04/09/2010	Assented-to notice of automatic extension of time (Susan P. McGinnis)
04/09/2010	State's brief now due 5/4/2010.
05/04/2010	Brief for the State of New Hampshire filed (Susan P. McGinnis). Atty. McGinnis request 5 minutes 3JX oral argument.
11/16/2010	Submitted On Briefs
11/18/2010	Affirmed.
12/06/2010	MANDATE ISSUED
12/14/2010	Transcripts (5 vols.) placed in closet to be returned to HCSC-S.

Appendix A

01/07/2011	Return receipt for transcripts filed (HCSC-S).
02/23/2011	Petition for writ of certiorari was filed & placed on the docket as No. 10-8974 (Supreme Court of the United States).
06/03/2011	Notice from clerk of Supreme Court of the United States that Barion Perry's petition for writ of certiorari was granted.

APPENDIX B — ORDER OF THE NEW HAMPSHIRE SUPREME COURT, DATED NOVEMBER 18, 2010

NEW HAMPSHIRE SUPREME COURT

In Case No. 2009-0590, *State of New Hampshire v. Barion Perry*, the court on November 18, 2010, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. *See Sup. Ct. R. 18(1)*. We affirm.

The defendant was convicted of theft by unauthorized taking. On appeal, he contends that the admission of a witness's out-of-court identification of him violated his right to due process under the State and Federal Constitutions. *See* N.H. CONST. pt. I, art. 15; U.S. CONST. amend. XIV. We first address the defendant's claim under the State Constitution, and cite federal opinions for guidance only. *See State v. Ball*, 124 N.H. 226, 231-33 (1983).

The admissibility of identification evidence over a due process objection is governed by the *Biggers* test. *See Neil v. Biggers*, 409 U.S. 188 (1972). The *Biggers* test requires a two-step analysis. *State v. King*, 156 N.H. 371, 373-74 (2007). In *King* we articulated the analysis as follows:

> Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive. At this stage of the inquiry, the defendant has the burden of proof.

> Only if the defendant has met his burden must we then consider the factors enumerated in *Neil v. Biggers* . . . to determine whether the identification procedure was so suggestive as to render the identification unreliable and, hence, inadmissible. At this stage of the inquiry, the State bears the burden.

Id. at 374 (quotation omitted). We will overturn the trial court's ruling only if its decision was contrary to the weight of the evidence. *State v. Bell-Rogers*, 159 N.H. 178, 181 (2009).

Here, the trial court found that the witness's identification of the defendant was not derived from any suggestive technique employed by the police. As the trial court found, the witness pointed out the defendant from her apartment window without any inducement from the police. The defendant, relying upon decisions of the First Circuit Court of Appeals in *United States v. Bouthot*, 878 F.2d 1506 (1st Cir. 1989), and *United States v. De Leon-Quinones*, 588 F.3d 748 (1st Cir. 2009), argues that a suggestive scenario remains suggestive even if it is not intentionally orchestrated by the police in order to produce an identification. We recently rejected this argument, however, stating: "We decline to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all 'suggestive identification procedures.' *Bouthot*, 878 F.2d at 1516. Instead, we hold that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action." *State v. Addison*, 160 N.H. __, __ (decided October 19, 2010). Because the evidence supports the trial court's

finding that the defendant failed to carry his burden of proof on the first step of the *Biggers* analysis, we need not consider the second step. *See King*, 156 N.H. at 374.

In *Addison*, we also concluded that the Federal Constitution provides no greater protection than does the State Constitution under these circumstances. *See Addison*, 160 N.H. at ___. Accordingly, we reach the same result under the Federal Constitution as we do under the State Constitution.

Affirmed.

Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Clerk, Hillsborough County Superior Court South,
#08-S-1797-1798
Honorable James J. Barry, Jr.
Honorable William J. Groff
Honorable David B. Sullivan
Honorable Robert J. Lynn
Marcia McCormack, Supreme Court
Michelle A. Caraway, Supreme Court
Appellate Defender
Alex Parsons, Esquire
Susan P. McGinnis, Esquire
File

APPENDIX C — MOTION TO SUPPRESS OUT OF COURT IDENTIFICATION BY MS. BLANDON IN THE STATE OF NEW HAMPSHIRE, HILLSBOROUGH, SS SUPERIOR COURT, SOUTHERN DISTRICT, DATED FEBRUARY 18, 2009

STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS
SUPERIOR COURT

February 18, 2009

State of New Hampshire

v.

Barion Perry

08-S-1797-8

Motion to Suppress Out of Court Identification by Ms. Blandon

NOW COMES the Accused, Barion Perry, and respectfully requests that the Honorable Court suppress the out of court identification of Ms. Nubia Blandon Castro on August 15, 2008 as it was unnecessarily suggestive. This request is made pursuant to Part I, Article 15 of the New Hampshire Constitution, the Fourteenth Amendment of the United States Constitution and the holdings of *Neil v. Biggers*, 409 U.S. 188 and *State v. LeClair*, 118 N.H. 214 (1978).

As grounds for this motion, the following is stated:

Appendix C

Facts

1. Mr. Perry is charged with one count of theft by unauthorized taking and one count of criminal mischief:

2. The facts relied upon in this section were taken from the discovery provided to the undersigned by the State.

3. On September 21, 2008, Ms. Blandon Castro was interviewed by Detectives from the Nashua Police Department.

4. During that interview she was unable to pick Mr. Perry out of a photo array.

5. However, she did state that "the subject that she observed in police custody was the same subject that she observed taking the speakers out of Alex's truck."

Legal Argument

6. Part 1, Article 15 and the Due Process Clause of the Fifth Amendment require that evidence of eyewitness identifications be suppressed whenever unnecessarily suggestive identification procedures have resulted in an unreliable identification. *See State v. Allen*, 133 N.H. 306, 311 (1990); *Manson v. Brathwaite*, 432 U.S. 98 (1977).

7. In *Stovall v. Denno*, 388 U.S. 293; the Supreme Court held that the defendant could claim that "the confrontation conducted...was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of the law."

8. In *Neil v. Biggers*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment required that courts apply a "totality of the circumstances" test in determining whether the Accused's due process rights had been violated by an unnecessarily suggestive show up. 409 U.S. 188 (1972).

9. The Supreme Court adopted four factors in determining whether a photo lineup was unnecessarily suggestive. *Biggers*, 409 U.S. at 412. Those factors include the opportunity of the witness to view the suspect at the time of the crime, the witness' degree of attention, the amount of time that has gone by in between the confrontation and the acts alleged and the accuracy of the description. *Id.*

10. In 1978, the New Hampshire Supreme Court, holding that acknowledged that the dangers of misidentification were well-known and documented. *State v. LeClair*, 118 N.H. 214 (1992). In order to protect against a miscarriage of justice and in order to protect the due process rights of the accused, the New Hampshire

Supreme Court adopted the factors enumerated in *Neil v. Biggers*. *Id.*

11. The Court must determine whether the out-of-court procedures used by the police were unduly suggestive by asking "whether the police implicitly conveyed their opinion of the criminal's witness..." *State v. Rezk*, 135 N.H. at 601; *State v. Duff*, 129 N.H. 731, 736 (1987). The burden is on the defendant to show that the procedures were unnecessarily suggestive. *Id.*

12. In *LeClair*, the Supreme Court found that the alleged victim did not have a sufficient opportunity to view the robber when the robber paid the victim the most attention, the victim saw the suspect for 20-30 seconds and the victim was tied up face down on the floor. 118 N.H. 214.

13. The defendant has the initial burden of showing that the identification procedure was unnecessarily suggestive. *Allen*, 133 N.H. at 310. Once the defendant has met this burden, the burden shifts to the State to prove by clear and convincing evidence that the identification is reliable.

14. In this case, the out of court identification was unnecessarily suggestive. It is essentially a one-man show-up. Ms. Blandon-Castro essentially says that Mr. Perry is definitely the man that committed the acts, only because she saw him

being arrested. She relies heavily on context cues, such as handcuffs and police cruisers, to make that identification.

15. According to her discussions with police, she was only able to describe him as tall, skinny and black. She was unable to describe facial features, length of hair, hair style or what the perpetrator was wearing.

16. She was unable to pick him out of a line-up, which indicates that she did not have sufficient time or opportunity to observe the alleged perpetrator on August 15, 2009.

WHEREFORE, the Accused respectfully requests that the Honorable Court:

A. Grant this motion to suppress as the photo array was unnecessarily suggestive in violation of the constitutional provisions and cases cited in this motion;

B. Schedule this for a hearing as soon as the docket permits;

C. Issue written findings of fact and rulings of law;

D. Any other relief as justice permits.

Appendix C

Respectfully submitted,

/s/_____

Melissa A. Kowalewski
N.H. Bar 16464
N.H. Public Defender
188 Main Street
Nashua, NH 03060

[Certificates of service not reprinted for this or other pleadings.]

APPENDIX D — STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS OUT OF COURT IDENTIFICATION BY MS. BLANDON IN THE STATE OF NEW HAMPSHIRE, HILLSBOROUGH, SS. SUPERIOR COURT, SOUTHERN DISTRICT, DATED MARCH 2, 2009

THE STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS.
SUPERIOR COURT
SOUTHERN DISTRICT

ST. NO. 08-S-1797-8

THE STATE OF NEW HAMPSHIRE

v.

BARION PERRY

STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS OUT OF COURT IDENTIFICATION BY MS. BLANDON

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, with an objection and moves this Honorable Court to deny defendant's Motion. As grounds for its Objection the State of New Hampshire sets forth as follows:

1. The defendant has filed a motion to suppress in the above-captioned matter. The State objects.

2. First, the motion is untimely, as the deadline for substantive motions has passed.

3. Second, counsel for the State received multiple motions in multiple cases on or around the same date.

4. The State would respectfully request that this Honorable Court allow the State to file a memorandum of law in 10 days. This will allow the State time to sufficiently address the issues raised in the defendant's motion.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

A. Deny defendant's motion; and

B. Allow the State to file a supplemental memorandum of law in 10 days; and/or

C. Schedule a hearing on the motion; and/or

D. Grant such other and further relief as may be just and proper.

DATED: March 2, 2009,

Respectfully submitted,

/s/_____
Patricia M. LaFrance, Esq. #14910
Assistant County Attorney

APPENDIX E — STATE'S MEMORANDUM OF LAW IN THE STATE OF NEW HAMPSHIRE, HILLSBOROUGH COUNTY, SS. SUPERIOR COURT, SOUTHERN DISTRICT, DATED MARCH 11, 2009

THE STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY, SS.
SUPERIOR COURT
SOUTHERN DISTRICT

ST. NO. 08-S-1797-98

STATE OF NEW HAMPSHIRE

V.

BARION PERRY

STATE'S MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS PHOTO IDENTIFICATION
[Parties Agree This Memo Supports Objection To Out Of Court Identification By Ms. Blandon.]

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, with a memorandum in support of its objection. In support thereof, the State sets forth as follows:

FACTS

1. The defendant, Barion Perry, is charged with one Felony count of Theft By Unauthorized Taking and one Felony count of Criminal Mischief, contrary to RSA 637:3 and RSA 634:2, respectively.

2. On August 15, 2008, Officer Nicole Clay of the Nashua Police Department was dispatched to the back parking lot of 70 ½ West Hollis Street for the report of a person attempting to gain entry into vehicles at that location. Upon arrival, Officer Clay heard a metal clang, as though something had been dropped on the ground nearby, and observed the defendant between two vehicles, carrying what appeared to be two amplifiers, one black and one red. Directly behind the defendant was a black bat with the inscription, "EASTON".

3. Officer Clay made contact with the defendant, who stated that he had just found the amplifiers and that a couple of guys had just been in the back parking lot. The defendant claimed that the two guys had abandoned the bat. After the defendant offered a brief description of the two individuals, he and the officer walked the area in search of these suspects. Officer Clay made contact with one Hispanic male, who denied any involvement. While speaking with the Hispanic male, the defendant was constantly talking and trying to tell the officer that he had found the amplifiers in the middle of the parking lot and that he was only moving them when she arrived. He stated that it was the two males he described that had stolen the things he was carrying.

4. Officer Clay then made contact with Nubia Blandon and Alex Clavijo, both of 70 ½ West Hollis Street. Clavijo is the owner of a black Honda Civic that was broken into and had the amplifiers removed. Clavijo did not see the theft, but Blandon did. Blandon stated that she saw a black male, later identified as the defendant, walking through the back parking lot and

looking into cars. She stated that the male looked into every vehicle and then circled around Clavijo's car. Blandon stated that she observed the black male open the trunk of the vehicle and remove a large item. Clavijo stated that the item removed was most likely the amplifiers, which are contained in a wooden box. Blandon stated that she saw the black male carrying a bat. When asked to describe the male, Blandon stated that it was the male standing with the officer in the back of the parking lot; the defendant.

5. Officer Clay spoke with Clavijo about his vehicle. Clavijo inspected his vehicle and informed the officer that his entire system was gone and that wires were left hanging out of his trunk. He further stated that his bat was missing. Clavijo confirmed that the amplifiers found in the defendant's possession and bat located nearby were his. He also confirmed a wrench found on the defendant was his. The defendant was arrested and charged accordingly.

LEGAL ANALYSIS

6. The defendant has filed a Motion to Suppress Photo Identification. However, the crux of the defendant's argument focuses on Ms. Blandon's out-of-court identification of the defendant at the scene of the crime, arguing that such identification was unnecessarily suggestive. Specifically, the defendant argues that her identification was essentially a one-man show-up, in which the defendant was already in police custody. The defendant submits that Ms. Blandon's later inability to select the defendant from a photo-array is

indicative of the suggestiveness facilitated at the crime scene. As such, the State will address the defendant's Motion not for the purpose of excluding the photo identification, but rather, Ms. Blandon's identification of the defendant at the scene. Regardless, the State objects.

I. ***Ms. Blandon's Identification Of The Defendant Was Not The Equivalent Of A One-Man Show-Up***

7. In a challenge to the admissibility of an out-of-court identification, the burden to prove unnecessary suggestiveness rests on the defendant. *State v. Humphrey*, 129 N.H. 654 (1987).

8. A one-man show-up has been recognized as some type of police facilitation of identification where, acting in their capacity as police, present only one suspect to the victim or witness for identification purposes. *See State v. Guay*, 130 N.H. 413, 417-18 (1988); *State v. Leclair*, 118 N.H. 214 (1978); *State v. Butler*, 177 N.H. 888 (1977); *Stovall v. Denno*, 388 U.S. 293 (1967). For instance, in *Guay*, the victim of a car theft and kidnapping was brought to the location of his vehicle where he identified the Defendant who was alone seated in the back seat of a police cruiser. *Guay*, 130 N.H at 416. The victim immediately identified *Guay* as the perpetrator of the kidnapping. *Id.* The court found this constituted a one-man show-up for purposes of identification but found that it was not unnecessarily suggestive. *Id.* at 417-18. Similarly, in *Leclair*, the Court held that, presenting a previously identified

defendant along with a person, known to a victim to be a police officer, constituted a one-man show-up, which was unnecessarily suggestive. *Leclair*, 118 N.H. at 217 (1978). Specifically, the victim viewed the defendant through a one-way mirror at police headquarters for purposes of identification. *Id.*

9. Here, unlike the above-cited cases, Ms. Blandon's identification of the defendant was not facilitated by the police in any fashion. To the contrary, Ms. Blandon was at the scene of the crime, observed the crime in progress, and described its occurrence in detail. When asked to describe the male she witnessed break into Clavijo's vehicle, Ms. Blandon immediately identified the defendant as the one standing with the officer in the back of the parking lot. Ms. Blandon's identification of the defendant occurred moments after the crime and at the scene of the crime. There is nothing in the facts to indicate that the police facilitated her identification. They did not bring her to the defendant or the defendant to her. As such, Ms. Blandon's out-of-court identification is not the equivalent of a one-man show-up.

II. *The Out-Of-Court Identification Was Neither Unduly Suggestive Nor Unreliable*

10. An out-of-court identification is admissible unless defense can prove the procedure used was "unnecessarily suggestive and conducive to irreparable mistaken identification. . . ." *State v.*

Philbrick, 135 N.H. 729, 730 (1992) (quoting *State v. Fecteau*, 133 N.H. 860, 867 (1991)). To determine if the identification is unnecessarily suggestive, the Courts will look to the police action and determine if their action "implicitly conveyed their opinion of the criminal's identity to the witness." *State v. Rezk*, 135 N.H. 599, 601 (1992) (quoting *State v. Duff*, 129 N.H. 731, 736 (1987)). The trial court is given great deference in this determination. *See Fecteau*, 133 N.H. at 867. "Only if the defendant has met his burden must [the court] then consider the factors enumerated in *Neil v. Biggers*." *State v. King*, 934 A.2d 556, 559 (2007). Conversely, if the defendant meets his burden, the State may prove to the Court that the identification is reliable, notwithstanding its suggestiveness. *State v. Cyr*, 122 N.H. 1155, 1158 (1982); *Biggers*, 409 U.S. 188, 199-200 (1972).

A. *The Out-Of-Court Identification Was Not Unnecessarily Suggestive.*

11. In a challenge to the admissibility of an out-of-court identification, the burden to prove unnecessary suggestiveness rests on the defendant. *State v. Humphrey*, 129 N.H. 654, 656 (1987).

12. A one-man show-up has been recognized as some type of police facilitation of identification where, acting in their capacity, the police present only one suspect to the victim or witness for identification purposes. *Guay*, 130 N.H. at 417-18.

13. Here, as argued above and as in *Guay*, Ms. Blandon witnessed the defendant's commission of the crime first hand, as was evidenced in her accurate description of incident. Moments later, she identified the defendant with much certainty and independently from police facilitation. The police did not bring the defendant to Ms. Blandon or Ms. Blandon to the defendant. Rather, he was standing in the back of the parking lot with another officer.

B. *The Identification Was Reliable Under The Totality Of The Circumstances*

14. The New Hampshire Supreme Court, as a general rule, will hold a show-up identification to be unnecessarily suggestive absent exigent circumstances. *See Leclair*, 118 N.H. at 219 ("We reiterate our condemnation of [one-man show-up identifications] absent exigent circumstances.")

15. "The law is well-settled that when unnecessarily suggestive police identification procedures are used, the State must demonstrate by clear and convincing evidence, in light of the totality of the circumstances, that the identification was nonetheless reliable, based on observations uninfluenced by the suggestive procedures used by the police." *State v. Whittey*, 134 N.H. 310, 312 (1991) (quoting *Guay*, 130 N.H. at 417). "The five factors indicating the reliability of the identification under this totality of the circumstances test are: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of any prior description given by the witness;

(4) the witness's level of certainty at the time of the identification; and (5) the time lapse between the crime and the identification." *Whittey*, 134 N.H. at 312 (quoting *Guay*, 130 N.H. at 417).

16. When applied to Ms. Blandon's identification of the defendant, the five-factor totality of the circumstances test unquestionably leads to the conclusion that her identification was reliable and based on observations uninfluenced by any suggestive procedures used by the police.

17. First, Ms. Blandon had an excellent opportunity to view the defendant. She stated that she saw a black male walking through the back parking lot and looking into cars. She stated that he looked into every car and then circled around the victim's. She stated that she observed the black male to open the victim's trunk and remove a large item. She stated that the black male was carrying a bat. When asked to describe the black male further, Ms. Blandon, without hesitation, identified him as the one with the officer. As such, it is evident that Ms. Blandon had sufficient opportunity to watch and observe the defendant, as she described his passage and activity within the parking lot.

18. Second, Ms. Blandon's degree of attention is evidenced by her description of the events as they occurred, the gender and race of the defendant, the fact that he was carrying a bat which was found at the scene, and that he removed a large object from the victim's car, which proved to be accurate.

19. Third, the pre-identification description of the defendant provided by Ms. Blandon was very accurate. She described the defendant's physical characteristics with accuracy. However, even if the description was found to be "lacking in some details, [it] substantially agreed with the defendant's appearance." *Whittey*, 134 N.H. at 314; *see also State v. Heald*, 120 N.H. 319, 323 (1980) (holding that the descriptions given by the three witnesses were sufficiently accurate, despite that they varied in detail); *State v. Allard*, 123 N.H. 209, 214 (1983), (upholding the trial court's finding that the identification was reliable where "[t]he inconsistency between the defendant's appearance and the victim's description of him was limited to the absence of a moustache and a discrepancy in hair length"). Further, Ms. Blandon stated that the defendant was carrying a bat and had removed a large item from Clavijo's vehicle. A bat was found at the scene and the amplifiers found in the defendant's possession had been contained in one large box in Clavijo's vehicle.

20. Fourth, Ms. Blandon identified the defendant with certainty, as she immediately identified him as the one in the back of the parking lot standing with the officer.

21. Finally, the identification occurred only a matter of minutes after the occurrence of the crime in question. "The short time lapse between the occurrence of the burglary and the witness's identification of the defendant as the [perpetrator] strengthens the reliability of the identification." *Whittey*, 134 N.H. at 313. Officer Clay made contact with the defendant in

the very parking lot where the crime occurred and only moments after its occurrence, as is evidenced by the sound of the bat dropping to the ground when the defendant was removing the amplifiers from Clavijo's vehicle. Shortly after making contact with the defendant, Ms. Blandon identified him as the one she saw commit the theft.

22. Accordingly, as Ms. Blandon's identification of the defendant at the crime scene is inarguably reliable, her inability to later select him from a photo array is moot. Therefore, the defendant's Motion to Suppress should be denied.

CONCLUSION

23. Ms. Blandon's identification of the defendant at the crime scene was not the equivalent of a suggestive one-man show-up because the police did not initiate the identification. Further, her identification was not unnecessarily suggestive for the same reason. Even if the Court determines that the identification was unnecessarily suggestive, the out-of-court identification is reliable under the five-factor totality-of-the-circumstances test utilized by the New Hampshire Supreme Court.

DATED: March 11, 2009

Respectfully submitted,

/s/_____
Patricia M. LaFrance, Esq. # 14910
Assistant County Attorney

APPENDIX F — TRANSCRIPT OF MOTION BEFORE THE HONORABLE DAVID B. SULLIVAN SUPERIOR COURT JUSTICE, DATED APRIL 20, 2009

[1]STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT - SOUTH

Supreme Court No. 2009-0590

Nashua, New Hampshire
Monday, April 20, 2009

Case No. 08-S-1979 08-S-1798

STATE OF NEW HAMPSHIRE,

Complainant,

vs.

BARION PERRY,

Defendant.

TRANSCRIPT OF MOTION BEFORE THE HONORABLE DAVID B. SULLIVAN SUPERIOR COURT JUSTICE

* * *

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[3] (Proceedings commence at 3:06 p.m.)

THE COURT: I think even though it's the defense's motion, I think it makes sense for the State to go first.

MS. LA FRANCE: Yes, Your Honor. And I apologize for being late. I was up in Courtroom 8.

THE COURT: Hey, you can't be in two places at the same time.

MS. LA FRANCE: I have tried, but it just doesn't happen.

THE COURT: I'll blame Groff.

MS. LA FRANCE: And, Your Honor, I would -- there were two -- actually two motions that are scheduled for today, but I would actually, I guess at this point, ask the Court to defer ruling on the motion regarding the in-court identification until trial. I think it can be established through the testimony of the actual witness, the eyewitness.

THE COURT: Well, let's see how we go today anyway because --

MS. LA FRANCE: Okay.

THE COURT: -- see, what's happened we're already six minutes --

MS. LA FRANCE: Well, no, it's not this witness; it's another witness, I guess, technically.

[4] THE COURT: No, but -- no, but let's do the -- you're saying that the witness's evidence would be different on the two issues?

MS. LA FRANCE: It would, Your Honor. I think the second motion which was the motion -- it's really probably should be titled a "motion in limine."

MS. KOWALEWSKI: It's more a motion in limine. One deals with the out-of-court identification that happened at the scene. The motion to exclude is more of a -- it's more to exclude the in-court identification.

THE COURT: Oh, no, I tried everything and I had plenty of time to read it several times. I thought I was going to get squeezed because I'm in here covering for Judge Lynn, but it turns out I had tons to time to digest everything, so I've read everything that both of you have filed, but the key issue is the identification at -- and by the way, I think one of your motions is mistitled.

MS. LA FRANCE: It is mistitled, Your Honor. I saw that.

THE COURT: Yeah. So when you're done today, take a pen and change that.

MS. LA FRANCE: I will.

THE COURT: Just take a pen, it would be better. Both [5] of you change it because I don't want someone to make a mistake.

MS. KOWALEWSKI: I'll clarify -- it's to clarify the record.

THE COURT: Yeah, I knew what you meant. Okay. So -- but the key issue here is the identification at the scene.

MS. KOWALEWSKI: Yes.

MS. LA FRANCE: Right.

THE COURT: So let's go with that. But I don't -- what difference -- what evidence is going to be different in terms of the witness testifying at the -- regarding the in-court identification. And the other thing is according to your brief the in-court identification is almost a question of law --

MS. LA FRANCE: Well, I think the facts --

THE COURT: -- compared to that.

MS. LA FRANCE: -- supporting it would be gleaned at trial anyway and then, you know, we would just hold off on having the witness actually identify him in court until we could establish sufficient

MS. KOWALEWSKI: And independently.

MS. LA FRANCE: -- facts to --

THE COURT: Is that okay with you?

MS. KOWALEWSKI: I kind of wished we could have resolved everything today. I mean, I guess, my position also is [6] [Clay – Direct] that you kind of need this other witness for the motion to suppress the out-of-court identification. Also because you kind of have to glean what she saw in conjunction with the factors that are set forth in *Biggers*, so I guess I'm kind of confused as to why there's only a police officer today and there's not that other witness either.

THE COURT: Yeah. Anyway, let's deal with -- let's right now let's deal first because we may not get done today.

MS. KOWALEWSKI: Okay.

THE COURT: But let's deal first with the at-the-scene identification.

MS. LA FRANCE: Okay. And with that, Your Honor --

THE COURT: And then we'll turn around and deal with the second later.

MS. LA FRANCE: -- the State calls Nicole Clay.

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NICOLE CLAY, WITNESS FOR THE STATE, SWORN.

DIRECT EXAMINATION BY MS. LA FRANCE:

Q. Could you tell us your name please and spell your last name for the court reporter?

A. My name is Nicole Clay, C-l-a-y.

Q. And what is your occupation?

A. I'm a police officer with the Nashua Police Department.

Q. Have long have you been with Nashua?

[7] A. Just over two years.

Q. Are you a certified full-time police officer?

A. Yes, I am.

Q. Okay. And what police academy did you attend?

A. I attended the New Hampshire State Police Academy in the spring of 2007 and completed training with my department.

Q. What is your current position?

A. I am a patrol officer.

Q. And how long have you been a patrol officer with Nashua?

A. Since getting out of the academy, so a little less than two years.

Q. Okay. Could you tell the Court please in general what are your duties as a patrol officer with the City of Nashua?

A. I patrol the city in a marked cruiser in uniform. I initiate work like motor vehicle stops, suspicious activity, get dispatched to calls, handle calls.

Q. Okay. I'd like to talk to you now specifically about August 15, 2008, at approximately 2:53 a.m. Were you working at that time?

A. Yes, I was.

Q. Okay. Were you dispatched to a particular location?

A. Yes, I was.

Q. Where were you dispatched to?

[8] A. I was dispatched to the back parking lot of 70 1/2 West Hollis Street.

Q. And what was the nature of the call that you received?

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A. We received a report about a black male looking through vehicles and attempting to gain entry into vehicles.

Q. Okay. And what did you observe once you got there?

A. When I arrived to the back parking lot I observed a black man standing between two vehicles at the southeast end of the parking lot. Just before I observed him I heard what sounded like a metal clang.

Q. Okay. Could you tell what that sound was or what it sounded like?

A. It sounded like something had just been dropped to the ground. I had an idea of what it was, but I didn't see the object.

Q. Okay. Well, what did it sound like? What object did it sound --

A. It sounded like a metal bat hitting the ground.

Q. Okay. And you said you saw a black male standing in between cars?

A. Correct.

Q. Okay. What did you do once you saw him?

A. The male then walked towards me and he was holding two [9] items that looked like amplifiers. I asked him to put those down and to come and speak with me.

Q. Okay. When you got there -- what were you driving?

A. I was driving a marked police cruiser.

Q. Okay. And were you in uniform?

A. Yes, I was.

Q. Okay. When you got there, were your sirens flashing or --

A. No, I just had my regular headlights on and I parked the car in front of the building at 70 1/2 West Hollis.

Q. Okay. And what happened once you asked the person to put what you thought were the speakers down?

A. He did that and he came and spoke with me.

Q. Okay. And did you determine who he was?

A. Yes.

Q. What was his name?

A. Barion Perry.

Q. Okay. And do you see the person you spoke to that night in the courtroom?

A. Yes, I do.

Q. Could you point to him and -- could you point to him, please?

A. The black male sitting at the defendant table with the [10] blue T-shirt on.

MS. LA FRANCE: Your Honor, I'd ask the record to reflect that the witness has identified the defendant.

MS. KOWALEWSKI: No objection, Your Honor.

THE COURT: He has -- she has. Sorry.

MS. LA FRANCE: Thank you, Your Honor.

BY MS. LA FRANCE:

Q. And what did he say after you identified him?

A. He told me that he had just found the amplifiers and was moving them.

Q. Okay. Where did he say he found them?

A. He said he found them on the ground.

Q. Okay. And did he say anything else during your conversation?

A. I asked him where they had come from and he told me that he had just seen a couple of kids leaving the parking lot.

Q. Okay. So what did you after he told you that he had seen these kids leaving the parking lot?

A. I asked him to describe them to me and he told me one was wearing a white T-shirt and the other should be on Ash Street and then we walked over to Ash Street.

Q. Okay. When you were talking to him, did you subdue him or handcuff him in any way?

[11] A. No, I did not.

Q. Okay. Did he walk with you willingly?

A. Yes, he did.

Q. Okay. And so he told you he had seen two subjects?

A. Yes.

Q. Okay. Did you find anybody out and about at that time of night?

A. We did. Actually Mr. Perry pointed to a male subject across the street once we were on Ash Street and said that he had been one of the males in the back parking lot.

Q. Okay. And what did you do after Mr. Perry pointed him out?

A. I spoke with that male. I asked him to come across the street and speak with me.

Q. Okay. And what did he -- did he comply?

A. Yes, he did.

Q. Okay. And what was his name?

A. Rowley Anzani.

Q. And --

THE COURT: Could you spell the last name?

THE WITNESS: A-n-z-a-n-i.

BY MS. LA FRANCE:

Q. And what did he say when you spoke to him?

[12] A. He told me that he had not been out of the house all night and that he had just come out to do something for his mother, that he had a friend over, but the friend had left a half an hour prior to my arrival and that he had not seen anyone on Ash Street in the last ten minutes.

Q. Okay. And while you were talking to Mr. Anzani, what was the defendant doing?

A. He was standing there with me listening and interjecting and he kept saying that he had just found the amplifiers and that other kids had stolen them.

Q. So who did you speak to after speaking to Mr. Anzani?

A. A male by the name of Alex Clavijo came out into the parking lot and approached me.

Q. Okay. And what did he say?

A. He identified one of the vehicles parked in the parking lot as being his and told me it had been broken into.

Q. Okay. And who did you speak to next?

A. Alex told me that he had found this out through a neighbor, so then I went upstairs and spoke to the neighbor.

Q. Okay. So can you tell the Court please, the place where you went, what type of building is it?

A. It's an apartment building and it's got a large lot in the back where the cars are parked. The building is -- that's [13] what the address 70 1/2 West Hollis Street is. It's a big apartment building. It's got an entrance in the front and the back.

Q. Okay. So where did you go to speak with Mr. Clavijo -- I'm sorry. How did you say it?

A. Clavijo.

Q. Clavijo.

A. His neighbor?

Q. Yeah.

A. We went into the building, either the second or the third floor in the hallway and made contact with her there.

Q. And where was the defendant while you were speaking to Mr. Clavijo's neighbor?

A. He remained in the parking lot with another police officer.

Q. Okay. And can you tell the Court please how did it come about that the defendant was staying with another police officer?

A. Several officers had been dispatched to this call, and so Officer Dunn had arrived shortly after I had and I asked him to stay with Mr. Perry because it was an ongoing investigation and we needed to make sure we had all parties that had knowledge of the situation to remain on scene until we figured out what was going on.

[14] Q. Okay. And who was the officer that arrived?

A. Officer Robert Dunn.

Q. Okay. And where was he with the defendant?

A. He was just standing in the back parking lot.

Q. Okay. And where did you end up speaking to Mr. Clavijo's neighbor?

A. In the hallway to the entrance of her apartment within the building.

Q. Okay. So what -- who was the person that you ended up speaking to?

A. Her name was Nubia Blandon.

Q. Okay. Were you able to speak with her directly?

A. No, she only speaks Spanish.

Q. Okay. So how did you communicate with her?

A. Mr. Clavijo translated.

Q. And so you were speaking to her in the hallway?

A. Correct.

Q. Okay. At that point could you see the defendant from where you were speaking to Ms. Blandon?

A. No, I could not.

Q. Okay. At any point did you take Ms. Blandon and point out the defendant to her?

A. No, I did not.

[15] Q. Okay. So what did Ms. Blandon see? I'm sorry. What does she say she saw?

MS. KOWALEWSKI: Objection, Your Honor. Hearsay and deprives Mr. Perry of his constitutional rights to confront all witnesses as guaranteed by *Crawford*, Part 1, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments of the Federal Constitution. So it's a two-prong --

THE COURT: Yeah. I'm good. I hear you. I'm going to overrule the objection. Does the State have this witness here?

MS. LA FRANCE: No, we don't, Your Honor.

THE COURT: Okay. It's still -- it's not hearsay if what you're talking about is what description --

MS. LA FRANCE: Actually, Your Honor, it's not hearsay

THE COURT: -- can the witness give before the witness saw the defendant in police custody. In other words, that aspect of it is a fact that has to do with -- in other words, the credibility is whether she's telling the truth about the witness's description; not the witness -- what did the witness tell her before she saw the defendant about the person that was looking into the --

MS. KOWALEWSKI: I mean, if it's --

MS. LA FRANCE: And --

[16] MS. KOWALEWSKI: I'm sorry. If it's coming in to prove what the description is, then it's hearsay.

THE COURT: That's different because we're not --

MS. KOWALEWSKI: I guess I --

THE COURT: Don't forget, I'm not the trier of fact.

MS. KOWALEWSKI: I guess I --

THE COURT: Stop.

MS. KOWALEWSKI: I'm sorry.

THE COURT: I'm not the trier of fact. I'm not deciding whether this guy did anything. What I'm deciding is whether the identification is reliable and that whole issue, and one of the things that is relevant to that is, what did the witness report prior to seeing the defendant in a lineup and what was the description before the lineup, and that's not a hearsay issue. Whether the defendant is the guy that was breaking into the car, that is a hearsay issue, but this is -- no, I'm going to overrule the objection and allow this witness to testify what the witness said for a description prior to her seeing the defendant with the other police officer.

MS. KOWALEWSKI: Thank you.

THE COURT: Okay.

MS. LA FRANCE: And, Your Honor, just so your clear, there was no lineup. I don't know -- I was unclear from --

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[17] THE COURT: Well, I -- she describes it as a one --

MS. LA FRANCE: Okay.

THE COURT: I know there was no lineup.

MS. LA FRANCE: Oh, okay. All right. I just wanted to make sure the Court was aware.

THE COURT: I'm referring to a --

MS. LA FRANCE: Okay.

THE COURT: If I use the word "lineup" it's a -- he's standing there next to another police officer and there's only two people in a lineup and one of them is dressed in blue; correct?

MS. LA FRANCE: That's true, Your Honor.

THE COURT: Okay. So when I used the word "lineup" I was using it wrongly and, of course, you would argue that there was never any lineup there; the guy Is just standing there and she happened to see him.

MS. LA FRANCE: Right.

THE COURT: Okay.

BY MS. LA FRANCE:

Q. Okay. So, Officer Clay, again if you could just -- so you were speaking with Ms. Blandon who was in the hallway of her building?

A. Correct.

[18] Q. Okay. And what did she say about this incident?

A. She described to me what she saw and who she saw in the back parking lot.

Q. Okay. Now, what was her description of who she saw?

A. She told me it was a black man.

Q. Okay. Did she have any other descriptions?

A. When I asked her to describe him, she told me it was the man that was in the back parking lot standing with the police officer.

Q. Okay. And when she said this, could you see the defendant at that point?

A. No, I could not.

Q. Okay. So when did she see him talking to the -- presumably, it would be Officer Dunn that he was talking to?

A. Correct. She kind of went back into her apartment and pointed towards the window to show me that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot.

Q. Okay. Officer Clay, what actions, if any, did you take to facilitate Ms. Blandon looking out her window to see Mr. Perry, the defendant, talking with Officer Dunn?

A. I did not take any action to facilitate that.

Q. Okay. Her viewing of Officer Dunn, when was that done, [19] before or after you first spoke to her?

A. That was before I spoke to her.

Q. Okay. To your knowledge did any other officers speak to her before this?

A. No, no other officer did.

Q. Okay. And just so I'm clear, your testimony is you were either on the second or the third floor?

A. Correct.

Q. Okay. And where was Officer Dunn and the defendant located?

A. They were still in the back parking lot where the cars are parked outside of the building.

Q. Okay. And did you see -- after Ms. Blandon had indicated that it was the subject talking to the officer, did you speak to anybody else after that?

A. I did.

Q. Who did you speak to?

A. Ms. Blandon's husband then arrived home and I spoke with him. His name is Joffrey Ullon.

Q. Okay. And was he able -- or who did he identify as the -- was he able to see?

MS. KOWALEWSKI: Objection. Relevance. We've already gotten past the identification that I'm challenging.

[20] THE COURT: Why it is relevant to excluding the identification of the defendant standing with the officer?

MS. LA FRANCE: Well, Your Honor, I guess the whole -- the crux of the argument in order to suppress an out-of-court identification is there has to be some action on the part of the police. You know, that's the crux of the argument and the State's position as always that there was no action on the part of the police and the State would submit that as an offer of proof he would testify that or we would -- Mr. Ullon identified it -- the defendant as essentially the same way that his wife did; that he happened to see the defendant talking to the officer so that is relevant to show that, again, that's -- there was

no part of the police in terms of action taken to facilitate these people recognizing the defendant as the person they saw looking into cars, so it makes more probable the fact that the police did not act -- have no -- had no action whatsoever in --

THE COURT: This is Alex -- how do you --

MS. LA FRANCE: Clavijo. Clavijo.

THE COURT: Yeah. This is a different gentleman.

MS. LA FRANCE: This is -- yeah, this is Ms. Blandon's husband who had -- my understanding is he came upstairs at some point and had previously seen the defendant talking to the officer. And as an offer of proof, again, the testimony would be [21] he essentially identifies him the same way and says it's the guy talking to the officer. So it makes more probable the fact that --

THE COURT: But we don't have a motion to suppress his ID?

MS. LA FRANCE: No, we don't, but it's relevant to this issue because we're talking about actions of the police, so it's more probable than not.

THE COURT: Oh, I know. But I'm still trying to figure out -- are you saying that he was out there with his wife when they saw someone looking in the cars?

MS. LA FRANCE: He note -- he saw him, too.

THE COURT: Okay. So he's a witness, too. And is he a State's witness this in trial?

MS. LA FRANCE: Yes, he is.

THE COURT: But he didn't have a photo lineup, or he did?

MS. KOWALEWSKI: Your Honor, if I may. I think I could probably clear this up. She has already testified. Her testimony is that she didn't do anything to elicit this identification which --

THE COURT: Do you agree with that?

MS. KOWALEWSKI: I'm not -- I'm just saying for [22] purposes of the argument she's --

THE COURT: I'm going to overrule the objection because even though she says that, I don't take it as gospel, you know. Some police officers are more aggressive than others and -- you know. Whatever. I'm going to overrule it, but I'm a little confused. You have this husband and wife team and they both are witnesses and there's a motion to suppress the wife's ID but not the husband's.

MS. LA FRANCE: Right.

MS. KOWALEWSKI: Right.

THE COURT: And did the husband do a photo lineup?

MS. LA FRANCE: You know what, my brain has left me, Your Honor.

THE COURT: I'm just curious why there's a motion to suppress one and not the other because the facts are identical, right? Up to now.

MS. KOWALEWSKI: No. They're actually not identical. The husband was going in and out of the apartment most of the night; the wife was there most of the night. There's some question as to the extent of the contact between the wife and who she saw that's not there necessarily with the husband.

THE COURT: Okay. It's not -- it's neither here nor there. I'm just curious why there's one and not the other. This [23] isn't like trial. This is just laying the --

MS. KOWALEWSKI: No.

THE COURT: I'll let him go through all of this, but --

MS. KOWALEWSKI: Pick apart that --

THE COURT: -- the motion to -- the objection to this evidence is overruled, but it's coming in just to show that the police weren't -- to help support the polices' position that they weren't setting up a lineup, that this is something that happened inadvertently.

MS. KOWALEWSKI: Your Honor, I'm also going to object on confrontation clause grounds under the Sixth

and Fourteenth Amendment and Part 1, Article 15 of the New Hampshire Constitution.

THE COURT: Okay.

MS. KOWALEWSKI: Thank you.

THE COURT: You're welcome.

BY MS. LA FRANCE:

Q. So who did Mr. Ullon identify? Let me back up. Mr. Ullon, how did you end up speaking to him?

A. Mr. Ullon arrived home as I was speaking with Ms. Blandon.

Q. Okay. Where had he been?

A. He had left to get coffee for his wife.

[24] Q. Okay. And what did he -- what knowledge did he have about this incident?

A. He told me that when he had gone out to the parking lot when he originally left the apartment, he saw a black male walking through the parking lot and lifting up on the door handles.

Q. Okay. Was he able to identify the person he saw lifting up on door handles?

A. Yes.

Q. And who did he say it was?

A. When I asked for a description Mr. Ullon told me that it was the man standing outside with the officer.

THE COURT: How do you spell his last name?

THE WITNESS: U-l-l-o-n.

BY MS. LA FRANCE:

Q. And when you were speaking to Ms. Blandon, how long did she say she was able to observe the defendant?

A. I don't believe she ever gave me a specific time, but she gave me several of the actions -- she described several of the actions that Mr. Perry took while he was outside.

Q. Okay. What were those actions?

A. Ms. Blandon told me that she saw him walk and look into all of the cars in the parking lot and that he then circled Mr. [25] Clavijo's car. She said she saw Mr. Perry open the truck and she also -- and remove a large item from the truck and she also saw him carrying a bat.

Q. I'm sorry. She saw him carrying a what?

THE COURT: Can I ask a question? Can I ask a question just because it its -- you said "all of the cars." How many is all of the cars, roughly?

THE WITNESS: I would guess about twelve to fifteen cars in the parking lot.

THE COURT: Thank you.

BY MS. LA FRANCE:

Q. And just so I'm clear this -- did Ms. Blandon say how she came to be observing the defendant in the middle of the night?

A. She did not.

Q. Okay. But you said her husband had gone to get coffee?

A. Correct.

Q. Okay. And that -- the parking lot, could you describe the lighting conditions?

A. The parking lot is fairly well lit. It has some lights. That building itself, 70 1/2 West Hollis Street, has lights on the back of the building that light up the parking lot. It was the middle of summer so all of the trees were -- had leaves on [26] them, but there was some light from the street lights on Ash Street coming in as well.

Q. Okay. And when you were speaking with Ms. Blandon in her apartment, did you have an occasion to look out the window to see Officer Dunn speaking with the defendant?

A. I did not.

Q. Okay. When you left the building were you able to see them across the parking lot?

A. Yes, I was.

Q. Okay. About how far away were they?

A. They were at the end of the parking lot. Maybe thirty feet away at that point. That's not where I had left them, so I don't know at what point they had moved.

Q. Okay. And were you able to see them clearly because of the lights?

A. The -- in that area the lighting was a little bit darker.

Q. Okay.

A. I knew who they were because I already knew who they were.

Q. Okay. And -- but you said that's not where you left them?

A. Correct.

[27] [Clay – Cross] Q. Where did you leave them?

A. Mr. Perry and I had been speaking in the middle of the parking lot and so that's where I left him when Officer Dunn stood with him and I went in the building.

Q. Okay. And how was the lighting in the middle of the parking lot?

A. Excellent.

Q. Okay. Thank you.

MS. LA FRANCE: I have nothing further. You may inquire.

CROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. Can you describe the uniform that you and Officer Dunn were wearing that night?

A. Officer Dunn and I actually wear different uniforms. He's a K-9 officer, but I was in a blue shirt, blue pants. I have my badge and my name tag are both metal, wearing a full duty belt so I had my gun and my pockets for my handcuffs and extra magazines, my radio, my police radio on.

Q. Okay. And what was his uniform -- what did his uniform look like?

A. Officer Dunn's uniform is blue pants, blue shirt. The only difference is that his badge and his name tag are sewn on in fabric patches.

[28] Q. Okay. And you were driving the Nashua Police Department cruiser, right?

A. Correct.

Q. Well, what does that look like?

A. That is a two-tone light blue and blue vehicle with the Nashua badge seal on it. It says "Nashua Police" on it.

Q. Was Officer Dunn in a cruiser that day also?

A. Yes, he was.

Q. And that -- his cruiser looks the same as your cruiser?

A. Yes. It just say "K-9 Unit" on it, I believe.

Q. Okay. And there's no way that those cruisers could be mistaken for a car that I drive as a civilian, right?

A. Correct.

Q. Okay. You're aware of the fact that Ms. Blandon couldn't pick Mr. Perry out of a photo array, right?

A. I only became aware of that today.

Q. Okay. So -- but you are aware that he did not -- that she was given a photo array, right? You're aware that she was given a photo array?

A. Correct.

Q. And she could not pick out Mr. Perry from that photo array?

A. Correct.

[29] Q. Okay. Have you ever done a photo array before?

A. Yes, I have.

Q. Okay. And there are normally six pictures in the photo array, right?

A. I've been trained to do eight.

Q. Okay. Why is it important to get eight pictures?

A. To have a variety. You know, we try to put as many pictures and options as we can.

Q. Okay. And you try to get people that look somewhat similar to each other, right?

A. Correct.

Q. Okay. And that's to much sure that you have an accurate identification?

A. Correct.

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Q. Okay. Ms. Blandon. I want to talk a little about your conversation with her. She was living in the second or third floor, right?

A. Correct.

Q. And this happened at night time, right?

A. Correct.

Q. Okay. About 2:30 in the morning?

A. I was dispatched around 2:53.

Q. I'm sorry?

[30] A. I was dispatched around 2:53 in the morning.

Q. Okay. Okay. And you asked her to describe the person that she saw?

A. Correct.

Q. Okay. And she described him as tall -- as a tall, black male?

A. Correct.

Q. Okay. She didn't -- she couldn't describe his clothing?

A. She didn't try. I asked for a description after I got tall, black male and she told me that he was outside.

Q. Okay. And she -- but she -- she said that he was the one that was talking to Officer Dunn, the K-9 officer, right?

A. Correct.

Q. Okay. She didn't describe any facial features that he had?

A. No.

Q. Whether he had facial hair?

A. No.

Q. Okay. Whether he had tattoos?

A. No.

Q. Okay. Whether he had piercings?

A. No.

Q. Okay. You didn't ask her where -- I'm sorry. Strike [31] that. You didn't ask her if she was constantly at the window, right?

A. I did not.

Q. Okay. Or if she had left the window?

A. No.

Q. You didn't ask her if she was doing other things in the apartment at that time?

A. I did not.

Q. Okay. You didn't ask her if she was on the phone?

A. Correct.

Q. Okay. You didn't ask her how long she -- you didn't ask her how long she observed the defendant for or the person for?

A. Correct.

Q. Okay. But you described on direct different actions that she said that he took, correct?

A. Correct.

Q. That could have -- those actions could have taken thirty seconds, right? Or ten minutes?

A. I don't believe that either time is correct on that.

Q. Okay. Could it have taken a shorter amount of time to do?

A. Yes, it could have short or long. Thirty or ten is -- [32] are quite extremes.

Q. Okay.

A. I don't think are either plausible.

Q. Okay. She could have -- it could have taken a couple of seconds or a couple of minutes?

A. More like a couple of minutes. A couple of seconds really isn't enough time for what she described to me.

Q. Okay. But it could have taken a short period of time or a long period of time?

A. Correct.

Q. Okay. Now, initially when you got to the scene you spoke with Mr. Perry, right?

A. Correct.

Q. And you spoke with him in the parking area of this apartment building?

A. Correct.

Q. Okay. And then you went into the apartment building, right?

A. No, first --

Q. I'm sorry. You spoke with Mr. Clavijo first?

A. No, first I -- after Mr. Perry I spoke with Mr. Anzani.

Q. I'm sorry. Mr. Anzani. I'm sorry. And then you spoke to Mr. Clavijo?

[33] A. Correct.

Q. Okay. And Mr. Clavijo told you that he didn't see anything but that his neighbor did?

A. Correct.

Q. Okay. And before going to speak with Mr. Clavijo, you had told Mr. Perry, hey, stay here with Officer Dunn, I'm going to go find out some more information, right?

A. No. Mr. Clavijo approached me in the parking lot.

Q. Okay.

A. I had a brief interaction with him when I went into the building.

Q. Okay.

A. Officer Dunn -- I don't remember what time Officer Dunn had arrived at what point --

Q. Okay.

A. -- but I was still in the parking lot and once I went into the building I asked Officer Dunn to stay with Mr. Perry.

Q. Okay. And Mr. Perry was the only black man in the area at that time, right?

A. Correct.

Q. Okay. You didn't have anybody else stand with him and Officer Dunn, right?

A. Correct.

[34] Q. Okay. And then you went into the building --

A. Yes.

Q. -- with Mr. Clavijo --

A. Yes.

Q. -- and you did that for the purpose of conducting further investigation, right?

A. Correct.

Q. You wanted to find out what happened, right?

A. Correct.

Q. Okay. And you went up to the second or third floor, right?

A. Correct.

Q. And you knocked on Mr. Clavijo's neighbor's door?

A. Correct.

Q. Okay. And she came out, right?

A. Yes.

Q. She doesn't speak any Spanish, though -- she didn't speak any English, though, right?

A. Correct.

Q. So Mr. Clavijo was translating for her?

A. Yes.

Q. And you asked her what she had seen, right?

A. Yes.

[35] Q. And she went back into her apartment and she said, hey, it's that guy out there standing with the police officer, right?

A. No.

Q. What did she say?

A. She told me that she had seen a man in the parking lot and described the events or the actions that he took that I mentioned on direct.

Q. You wrote a police report, right, in this matter?

A. Yes.

Q. And you were taught at the police academy how to write the police reports?

A. Correct.

Q. How to write -- and that's to help you to remember what happened that night, right?

A. Correct.

Q. Okay. And in your police report you said that the male was the one with the police officer in the black -- in the back lot?

A. I did say that. I just said it after.

Q. Okay. And that it was the same male that's been going around the --

MS. LA FRANCE: Objection. Your Honor, maybe she could let the witness finish answering the question.

[36] [Clay – Redirect]

THE COURT: Have you finished?

THE WITNESS: Not really.

THE COURT: Okay. Go ahead. Finish.

MS. KOWALEWSKI: I'm sorry.

THE WITNESS: Ms. Blandon described to me the actions. As I recall, I put those actions in my report first. Then I asked her for a description of the black male, at which point she said he's in the back lot with the officer.

THE COURT: Okay.

BY MS. KOWALEWSKI:

Q. And he was the only black male standing with that officer?

A. As far as I'm aware, yes.

Q. Okay. And once again --

MS. KOWALEWSKI: Actually I have no further questions for this witness. Thank you.

MS. LA FRANCE: Just a couple of followup questions.

REDIRECT EXAMINATION BY MS. LA FRANCE:

Q. Just to clarify, the items that you saw the defendant carrying, whose items were they?

A. Mr. Clavijo's

MS. KOWALEWSKI: Objection. Relevance.

THE COURT: Say it again.

[37] MS. KOWALEWSKI: Objection. Relevance.

THE COURT: Overruled.

BY MS. LA FRANCE:

Q. I'm sorry. Whose were they?

A. The items belonged to Mr. Clavijo.

Q. Okay. Was that consistent with what Ms. Blandon told you she saw take place around Mr. Clavijo's car?

A. The items I saw Mr. Perry holding were different from the items she saw him remove from the truck.

Q. Okay. How were they different?

A. The items Mr. Perry were holding were two amplifiers, so literally he could hold them like this. Ms. Blandon described Mr. Perry removing a large item from the trunk. I later learned from Mr. Clavijo that this was a large wooden box made of, like, plywood that contained two speakers, brand name of "Punch."

Q. Okay. So let me get this straight just so we're clear for the record. Ms. Blandon had described the defendant lifting out a big item from the trunk?

A. Correct.

MS. KOWALEWSKI: Objection. Leading.

THE COURT: Well, no, because she's just repeating what she said.

MS. LA FRANCE: I just want to clarify.

[38] THE COURT: She didn't add anything. She's just confirming.

BY MS. LA FRANCE:

Q. Okay. And what did Mr. Clavijo or -- okay. What did you see the defendant carrying?

A. He was holding two amplifiers.

Q. Okay.

A. They're about this big each and he was holding two of those.

THE COURT: Okay. So you're indicating something about three inches -- two inches high.

THE WITNESS: Maybe about four because there were two of them.

THE COURT: Four inches high. And how long?

THE WITNESS: A foot and a half at max. I mean, more like a foot.

THE COURT: Yeah. And how wide?

THE WITNESS: Oh, no, that's what I mean.

THE COURT: You have three dimensions, right?

THE WITNESS: Right.

BY MS. LA FRANCE:

Q. Would you say -- maybe to clarify, would you say about the size of a shoe box?

[39] A. Actually it would be about the size of that binder.

THE COURT: This one here?

THE WITNESS: He has holding two amplifiers --

THE COURT: I see.

THE WITNESS: -- and when you stack them, they're about this tall and about this far apart.

THE COURT: Okay. And about that deep?

THE WITNESS: And about that deep.

THE COURT: Okay. Two of them?

THE WITNESS: Correct. When you put two of them together that's what it looked like.

THE COURT: So she's pointing to a three-leaf, a fairly -- a reasonably fat, not real fat, but a reasonably fat three-ring binder.

BY MS. LA FRANCE:

Q. And were those amplifiers, were you able to later identify those amplifiers?

A. Yes, I was.

Q. Whose were they?

A. Mr. Clavijo's.

Q. Okay. Were -- how were they contained in his vehicle?

A. They were somewhere in the truck hooked up as part of the sound system for his stereo.

[40] Q. No, I'm sorry.

A. Oh.

Q. I'm sorry. You said -- you mentioned a pine box. Where does the pine box come into play?

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A. The box I later located outside of the vehicle that had been in Mr. Clavijo's trunk with the two speakers in it.

Q. Oh, okay. The speakers are different from the amplifiers that you're talking about?

A. Correct.

Q. Oh, okay. Now I think we have it. I'm sorry. Okay. Thank you. I think that clarifies it.

THE COURT: Clarify it for me. What's this about the speakers?

THE WITNESS: The speakers are, you know, what you would think of on a traditional stereo, the part that actually blows out the music. The amplifier, as I understand it, amplifies the music and gives you that little bass noise when you, you know, hear the cars driving by and they're really almost bouncing. So the speakers are -- you know, the front of them are a circle this big and they're deeper than that and they were contained in a very large box that actually stood about this tall, so it was maybe like three feet tall and at least a foot across.

[41] THE COURT: And were they there still in the car when you arrived?

THE WITNESS: They were not. They were in another location of the parking lot.

THE COURT: So they had been removed?

THE WITNESS: Correct.

THE COURT: But you didn't find the defendant with them?

THE WITNESS: No, he had been holding the amplifiers.

THE COURT: Oh, I understand. Yes.

THE WITNESS: Yes.

MS. KOWALEWSKI: I have no further questions, Judge. Thank you.

THE COURT: Okay. I have one last question, then. Did either of the two witnesses, Ms. Blandon or her husband, testify -- did they say anything to you about a baseball bat?

THE WITNESS: Ms. Blandon said that the man she saw, she identifies Mr. Perry, was carry a bat.

THE COURT: Anything else? You may step down.

THE WITNESS: Thank you.

(Witness excused.)

MS. LA FRANCE: The State has no further witnesses, Your Honor.

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[42] [Argument]

THE COURT: The defense have any witnesses?

MS. KOWALEWSKI: No, Your Honor, we do not.

THE COURT: Okay. Everyone is just going to rely on their briefs or do you want to give a --

MS. KOWALEWSKI: At this point I think I want to address what the State, I believe, is going to argue. They're going to argue that there's no state action that led to the improper lineup, and I would suggest to the Court that the investigation that Officer Clay conducted and the fact that she told Mr. Perry to remain where he was as well as her lack of followup with the eyewitnesses is enough of a state action and for the remaining part I'll rely on the Court's recollection of the facts and the law on my motion.

MS. LA FRANCE: Your Honor, I think the testimony of Officer Clay was she didn't tell him to stay where he was; she asked Officer Dunn to stay with him because they -- it was an ongoing investigation and she very clearly said that she put no restraints on Mr. Perry. He went over to speak to the first person they spoke to, the one he had originally accused of breaking into the cars, to speak with them and she testified he would kind of interject and kind of interrupt while she was speaking to the person, so clearly if there's a custody argument being made here, I don't know if it's a roundabout way of saying [43] that he was now in police custody.

But, again, Your Honor, there's no specific actions taken by the police that would establish that they're suggesting the identification of the defendant and that's what we need in order to say that it was unduly suggestive. Just because a person happens to be in the presence of a police officer during an investigation, for that matter, I think we would have to throw out virtually any identification made of a defendant at the scene of a crime if he happens to be at the scene of a crime talking to a police officer about that investigation, then anybody who says, hey, it was that guy talking to him, that's essentially what we have here. We have no action on the part of the police, you know, pointing to him and saying is this the guy.

And I would submit that, you know, that's the reason one-man showups are frowned upon where we do have instances where, you know, unfortunately or not, the police have somebody they suspect of committing a crime and they have to find out is this person actually the person that committed the crime and they do one-man showups. This was not a one-man showup, Your Honor. This just happens to be Mr. -- Ms. Blandon is looking out her window and sees the officers talking. They had no idea that this person was looking at her window, watching the officer talk to the defendant. How can they have control over somebody they [44] don't know exists yet?

Officer Clay testified that it wasn't until she spoke to Officer -- Mr. Clavijo that she learned of Ms. Blandon and then she went upstairs to talk to her. So, you know, how can they control the actions of somebody just watching events unfold? They didn't bring her down to the police

station, they didn't drive her anywhere to say, is that the guy. She happened to be there at the scene of the crime and saw the events as they unfolded.

MS. KOWALEWSKI: Your Honor -- I'm sorry. If you're --

MS. LA FRANCE: No, that's fine.

MS. KOWALEWSKI: You know, these are powerful context clues that we're dealing with, uniformed police officers, cruisers, things like that. When you remove the context clues in this -- and in this case you heard testimony when those context clues were removed and a six-man photo array was done, she failed to make an identification.

THE COURT: All right. And I -- even though your motion is worded like you want to exclude that, I'm sure you don't, right?

MS. KOWALEWSKI: No, I don't.

THE COURT: Yeah, so let's mark that up right now. Officer Clay, would you resume the stand just to clarify one [45] [Clay - Examination by the Court] issue?

MS. LA FRANCE: And, Your Honor, just so I'm clear, I mean, that goes to the weight of the evidence, not the admissibility of it. Whether or not she --

THE COURT: Oh, I realize that, and it's something that occurred after.

You're still under oath.

THE WITNESS: Yes, Your Honor.

(Witness resumes stand.)

THE COURT: When you said to Officer Dunn -- is that right?

MS. LA FRANCE: That's correct.

EXAMINATION BY THE COURT:

Q. When you said to Officer Dunn and the defendant, you know, stay here, you had no knowledge there was a witness, right?

A. Correct. Well, I knew that Ms. Blandon had seen something, someone breaking into the car, I didn't know what the context of her --

Q. Well, you knew because there was a police report?

A. I knew --

Q. Because you were called to the scene because someone had seen something.

A. Correct. What Mr. Clavijo also had told me is he didn't [46] [Clay-Recross] know that his car was broken into, that his neighbor had told him and then at that point we went upstairs.

Q. Okay. From where you were interviewing her, you couldn't see the defendant?

A. Correct.

Q. Could she see the defendant from where she was being interviewed without moving?

A. No, she could not.

Q. Yeah. She had to move over to the window to -- in order to see the defendant?

A. Correct.

Q. So when you were interviewing her she didn't have a view of the defendant and then when you asked her that question she walked over to the window and pointed him out?

A. She told me about it and then kind of pointed. She never actually walked over to the window.

THE COURT: Okay. Counsel, go ahead.

RECROSS EXAMINATION BY MS. KOWALEWSKI:

Q. The call didn't -- the call for assistance didn't come from Mr. Clavijo, right?

A. Correct.

Q. It came from Ms. Blandon's husband, right?

A. Correct.

[47] Q. Okay. You don't know how long Ms. Blandon was at that window before you knocked on the door, right?

A. Correct.

Q. Okay.

MS. KOWALEWSKI: I have no further questions, Judge.

THE COURT: Thank you very much.

MS. KOWALEWSKI: Thank you.

(Witness excused.)

THE CLERK: All rise.

(Proceedings concluded at 3:52 p.m.)

* * * *

APPENDIX G — ORDER OF THE STATE OF NEW HAMPSHIRE, HILLSBOROUGH COUNTY, SS SUPERIOR COURT, SOUTHERN DISTRICT, DATED APRIL 28, 2009

STATE OF NEW HAMPSHIRE,
HILLSBOROUGH COUNTY, SS SUPERIOR COURT,
SOUTHERN DISTRICT

08-S-1797-1798

State of New Hampshire

v.

Barion Perry

ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS

The defendant, Barion Perry ("Mr. Perry"), is charged with one count of theft by unauthorized taking and one count of criminal mischief. He now moves to suppress an out-of-court identification made by a witness, Nubia Blandon ("Ms. Blandon"), and any resulting in-court identification she may provide. The State objects. The Court conducted a hearing on these matters on April 20, 2007. For the reasons set forth below, Mr. Perry's Motions to Suppress are DENIED.

Background

For the purposes of these Motions, the Court finds the following facts are relevant. On August 15, 2008, at around 2:53 a.m., the Nashua Police received a report that

a black male was trying to gain entry into vehicles located in the back parking lot of an apartment building at 70 ½ West Hollis Street in Nashua, New Hampshire. Officer Nicole Clay ("Officer Clay") was dispatched to investigate. When she arrived at the parking lot, she heard a clang, as if an aluminum baseball bat had fallen to the ground, and she saw the defendant, a black male, standing between two vehicles. When she got out of her marked police cruiser, the man walked towards her, carrying two audio amplifiers. Officer Clay asked the man to put the amplifiers down and come speak with her. He complied and told her that he found the amplifiers on the ground and he was just moving them. She asked where the speakers came from and he replied that he had seen two "kids" leaving the parking lot. She asked for descriptions of the two "kids" and he claimed that one of the "kids" was on Ash Street.

Officer Clay and Mr. Perry walked over to Ash Street where Mr. Perry pointed out a man and indicated that he had been one of the kids leaving the lot. Officer Clay asked the man to come speak with her and he complied. During their conversation, a man named Alex Clavijo ("Mr. Clavijo") approached. Mr. Clavijo identified one of the vehicles in the parking lot as his and reported that his neighbor had witnessed someone breaking into the car. Officer Clay left Mr. Perry in the parking lot with Officer Robert Dunn ("Officer Dunn") and accompanied Mr. Clavijo into the apartment building to speak with his neighbor.

Mr. Clavijo escorted Officer Clay to his neighbor's apartment, which was inside the building at 70½ West

Hollis Street. His neighbor, Ms. Blandon, spoke with Officer Clay from her doorway while the officer stood in the hallway outside the door. Mr. Clavijo translated the conversation because Ms. Blandon speaks only Spanish. Ms. Blandon reported that she had watched from her apartment window as someone carrying a baseball bat looked inside all the vehicles in the parking lot, circled Mr. Clavijo's car, opened Mr. Clavijo's trunk, and removed a large item from the trunk.[1] She told Officer Clay that the person she saw was a tall black male. Officer Clay asked for a more specific description and Ms. Blandon pointed towards her window and stated that the person she saw was the person that was standing in the parking lot with the police officer. After this identification, Mr. Perry was arrested.

On September 21, 2008, the Nashua Police interviewed Ms. Blandon. They provided her with a photo array that included a picture of Mr. Perry and asked her to point out the man she had seen in the parking lot in August. She was unable to select Mr. Perry's photograph.

Analysis

Mr. Perry now moves to suppress Ms. Blandon's out-of-court identification of him, arguing that it violated Part 1, Article 15 of the New Hampshire Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, he claims that

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1. The large item that Ms. Blandon saw was a pine box containing audio speakers.

the identification was unnecessarily suggestive and not reliable. He further asserts that any in-court identification by Ms. Nubia must be suppressed because the State cannot demonstrate that it has a basis independent of the unlawful out-of-court identification. The State argues that the police did not use any unnecessarily suggestive procedures and that, in the alternative, the out-of-court identification was reliable. Further, the State claims that there are sufficient facts to demonstrate an independent basis for any in-court identification.

I. Out-of-Court Identification.

In determining whether to admit an out-of-court identification, the Court will use a two-step test. *State v. Cyr*, 122 N.H. 1155, 1158 (1982). The first step requires the Court to inquire "whether the identification procedure was unnecessarily suggestive." *Id.* If the this inquiry is answered in the affirmative, the Court will then "consider the factors enumerated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), and reiterated in *Manson* [*v. Braithwaite*, 432 U.S. 98 (1977)], to determine whether the identification procedure was so suggestive as to render the identification unreliable and inadmissible." *Id.*

Here, Mr. Perry claims that Officer Clay essentially facilitated a one-man show-up, a procedure that is inherently unduly suggestive. The Court disagrees with this characterization. Ms. Blandon pointed out Mr. Perry from her apartment window without any inducement from the police. Officer Clay did not ask Ms. Blandon whether the man standing in the parking lot was the man Ms.

Blandon had seen breaking into Mr. Clavijo's car and she did not direct Ms. Blandon's attention towards the window. On the contrary, Officer Clay could not even see Mr. Perry and Officer Dunn from where she was standing by the door of the apartment. Ms. Blandon's identification of Mr. Perry was spontaneously given when Officer Clay asked for a more specific description of the man Ms. Blandon had seen earlier. The fact that Mr. Perry was standing in the parking lot with Officer Dunn was coincidental; Officer Clay did not manufacture the situation in order to secure an identification. Thus, Ms. Blandon's identification of Mr. Perry was not derived from any suggestive technique employed by the police. *See State v. Fecteau*, 133 N.H. 860 (1991) (officers' behavior not unnecessarily suggestive where they took no action to facilitate the victim's identification of defendant made after an accidental run-in).

Mr. Perry argues that the parking lot was dark, creating less-than-ideal conditions for identification, and the only reason that Ms. Blandon was able to identify him was because he was standing with a uniformed officer in the parking lot where the crime occurred and that he was the only black male in the vicinity. He claims that his argument is supported by Ms. Blandon's inability to identify him in the photo array. The Court recognizes that these facts may cast doubt on Ms. Blandon's identification. However, they do not make the police behavior more suggestive. The police did not indicate that Mr. Perry was their primary suspect—Mr. Perry was not handcuffed or otherwise restrained and, as discussed above, the officers did not direct Ms. Blandon's attention to Mr.

Perry. Therefore, while Mr. Perry can inquire into the accuracy of Ms. Blandon's identification based on the environmental conditions and her later inability to identify him, these factors do not alter the suggestiveness of the police behavior. Because the police procedures were not unnecessarily suggestive, the identification is admissible, and the Court need not consider whether the identification was otherwise reliable. *State v. Allard*, 123 N.H. 209, 213 (1983).

II. In-Court Identification

"The integrity of a courtroom identification is dependent upon the out-of-court identification." *Allard*, 123 N.H. at 212. "When an out-of-court identification has been suppressed as being unduly suggestive and otherwise unreliable, a subsequent in-court identification will be allowed only if the State proves by clear and convincing evidence that the in-court identification ha[s] an independent source and [is] not influenced by the out-of-court viewing." *State v. Winders*, 127 N.H. 471, 475 (1985) (quotation omitted). Here, because the out-of-court identification was not derived from improper police procedures, the Court need not address whether there was an independent source for the in-court identification. *See State v. Howe*, 129 N.H. 120, 125 (1987) ("Having found the out-of-court identification reliable, we need not determine whether an independent source existed for the in-court identification.")

For the reasons provided, the Court finds and rules that Ms. Blandon's out-of-court identification of Mr. Perry was not derived from unnecessarily suggestive actions taken by the police. Accordingly, Mr. Perry's Motions to Suppress are hereby DENIED.

So ordered.

April 28, 2009

/s/_____

David B. Sullivan,
Presiding Justice

APPENDIX H — TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROBERT J. LYNN, SUPERIOR COURT JUSTICE AND A JURY, VOLUME 1 OF 2, DATED JUNE 16, 2009

[1] STATE OF NEW HAMPSHIRE HILLSBOROUGH COUNTY SUPERIOR COURT - SOUTH

Supreme Court No. 2009-0590

Nashua, New Hampshire
Tuesday, June 16, 2009
Volume 1 of 2. Pages 1-141

Case No. 08-S-1979 08-S-1798

STATE OF NEW HAMPSHIRE,

Complainant,

vs.

BARION PERRY,

Defendant.

TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROBERT J. LYNN SUPERIOR COURT JUSTICE AND A JURY

* * *

[3] [Pretrial Conference and Motions]

Appendix H

(Proceedings commence at 10:09 a.m.)

(Jury not present in court.)

THE CLERK: *State versus Barion Perry.* And Leo, is Mr. Perry here?

THE COURT OFFICER: I believe so.

THE CLERK: Anything to be taken up with the judge before we start?

MS. LA FRANCE: Yeah. There's one item. Your Honor?

THE COURT: Yes.

MS. LA FRANCE: Ms. Graham and her stepfather are here. Can they be excused? Their hearing is completed, right?

THE COURT: Oh, on the -- yes, absolutely.

MS. LA FRANCE: I didn't want to release them because they're --

THE COURT: Yeah, no, no, that's fine. That's fine. I'm just going to rule on the basis of the -- on the basis of the papers.

(Counsel and clerk confer.)

MS. LA FRANCE: May I approach, Your Honor?

THE COURT: Yes. Yes, sure come on up.

MS. KOWALEWSKI: Your Honor, I would like to object to this. I would like Mr. Perry up here before we argue about --

THE COURT: Sure. That's fine.

[4] MS. KOWALEWSKI: Thank you.

(Pause in proceedings.)

MS. KOWALEWSKI: Your Honor, this is Ryan and he's an intern in our office and I wanted to know if the Court had any objection to him sitting at counsel table?

THE COURT: No, not at all. Welcome.

THE INTERN: Thank you, Your Honor.

(Pause in proceedings.)

MS. LA FRANCE: Your Honor, as a matter of procedure I have an interpreter here for two witnesses. I'm not sure how -- do you want him to be sworn in now or just prior the witnesses' testimony.

THE COURT: It would probably make more sense to do it prior to the witnesses' testimony.

MS. LA FRANCE: Okay, fine.

(Pause in proceedings.)

THE COURT: Okay. I've got -- let me start this way. This is the matter of *State versus Barion Perry*, docket number is 2008-1797 and 1798. And I have before me now the State's motion to amend indictment or, in the alternative, to strike certain superfluous language.

In that motion, the State seeks to amend the indictment to allege that Hillsborough County Superior Court South as [5] opposed to North. I've read the motion, do you object?

MS. KOWALEWSKI: I do at this time, Your Honor.

THE COURT: Okay. Basis of the objection?

MS. KOWALEWSKI: The due process clause of the Federal Constitution 5th and 14th amendments, Part 1, Article 15 of the New Hampshire Constitution. And basically my objection is that this language is not superfluous, it's not simply a clerical error, it is, in fact, a substantial error.

And it is substantial for the following reasons: a clerical error is something like failure to log a call, typing an incorrect docket number, things like that. This particular -- this particular language that the State is seeking to change in this case -- in my -- my position is that it's actually something that is substantial and that it has to --

THE COURT: Why would it have to say anything? Why couldn't the indictment simply say he had two prior convictions?

MS. KOWALEWSKI: Well, I mean, the State has to prove the enhancement to the jury --

THE COURT: Sure. But why couldn't -- let me go back to my question. Why couldn't the indictment simply say after having been twice previously convicted of the offense of theft of services and then prove at trial, you know, where those thefts -- where the theft convictions were entered?

[6] MS. KOWALEWSKI: Well, I think that there are -- there are two issues. One is a notice issue and one is -- one is a relevancy issue, because I think that in this case because they've -- if I can explain.

THE COURT: Okay.

MS. KOWALEWSKI: If they are alleging that it comes out of Hillsborough South.

THE COURT: Right. No, I'm saying -- in my theory they're saying that simply didn't say what court it was, they simply said he had two prior convictions.

MS. KOWALEWSKI: Well, I think it also goes to the validity of the conviction. I mean, if the convictions --

THE COURT: How is what they allege in -- how does what they allege in the indictment go to the validity of the conviction?

MS. KOWALEWSKI: Well, I think -- I -- like I said, I think it's -- might -- I think it's a relevancy thing.

THE COURT: Relevancy?

MS. KOWALEWSKI: If they -- it might be -- if they can't -- if they -- they submit an inaccurate or incorrect conviction based upon what they've alleged that would go to whether or not they can prove their charge.

THE COURT: The indictment simply says he has two prior [7] convictions, it doesn't specify the court. How would that indictment be defective?

MS. KOWALEWSKI: I think it needs to be specific and specifically alleged where it came from because the State has to prove those with specificity. I think that -- that if the Court is going along that route, I think that the indictment would not be specific enough based upon that language.

THE COURT: All right.

MS. KOWALEWSKI: And I think the State needs to allege that with specificity in order to comply with the constitutional mandates and enhancements in sentencing.

THE COURT: All right. I reject the argument, frankly it borders on the frivolous. The notion that whether it makes a difference whether it's Hillsborough North or Hillsborough South is just not sensible. I'm going to allow the State to amend the indictment.

Now the next and more important question is --

MS. KOWALEWSKI: I have stipulation right here.

THE COURT: Okay. Oh, sure.

MS. KOWALEWSKI: *State v. Cardin*. If I may?

THE COURT: Okay. All right. Yep. So we're not going to be presenting this to the jury anyway.

MS. KOWALEWSKI: Right.

[8] THE COURT: Is that correct?

MS. KOWALEWSKI: Right.

THE COURT: Right.

MS. LA FRANCE: And, Your Honor, just to be clear, I guess -- you know I have it my opening that he's been previously convicted and I'll leave it at that and then I'll indicate in my opening that he has stipulated to that so the State doesn't have to prove it. Because it still has to be part of the State's case in terms of proving the enhancement to --

MS. KOWALEWSKI: No. Under -- I'm sorry, under *State v. Cardin* it takes it out of the consideration of the jury.

THE COURT: Right. Right.

MS. LA FRANCE: Oh, okay.

THE COURT: So any -- Mr. Perry, would you stand please, sir? Mr. Perry, it is alleged in one of these indictments, 2008-1797, that you committed the crime of theft by unauthorized taking and that you have two prior convictions for -- from this Court for theft of services on which you were imprisoned for terms in excess of one year; and that you also have a conviction for theft by unauthorized taking from this Court.

Now it's my understanding that you are prepared to stipulate that you have those prior convictions. Is that [9] correct?

THE DEFENDANT: Yes, Your Honor. Yes, Your Honor.

THE COURT: Okay. So do you understand that what that means then because you're stipulating to this there will be no need for the jury to be informed of the fact that you have those prior convictions?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And presumably that will inure to your benefit because if the jury did hear that, that would presumably be highly prejudicial against you. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. But the thing I want to also make sure you understand sir, is that by stipulating to this, do you understand that if, in fact, the jury finds you guilty of -- you know, without hearing any references to the prior convictions, I will then sentence you as if you had these three prior convictions. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In other words, there will be no -- you will not be able to then say, well, wait a minute I didn't really have the prior convictions or that, you know, something like [10] that. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I will just take it at a given that you have those three prior convictions. You understand that?

THE DEFENDANT: Yes, Your Honor.

MS. KOWALEWSKI: Speak up.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And you agree to that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. You had sufficient time to speak with Ms. Kowalewski about this?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And you're making this decision after being -- after being fully informed and advised by your attorney on this. Is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. All right. I'm going to accept that stipulation and in light of that the -- there will be no -- the State will be prohibited from presenting the prior convictions before the jury and I will also ask that the court clerk not to read that portion of the indictment.

MS. LA FRANCE: Your Honor, I guess -- just so -- because Your Honor was not -- did not preside over jury [11] selection, the jury has already heard that he has priors because he wasn't stipulating at that point. So kind of the cat is out of the bag.

MS. KOWALEWSKI: Your Honor, I can't control what the determinations made by my client and the timing.

THE COURT: Okay.

MS. LA FRANCE: I just wanted the Court to be aware and

THE COURT: Okay. Well, I'm glad you raised that. I'm glad you raised that because I didn't know that. What do you -- I mean, does anybody want me to say anything to the jury or just leave this, you know --

MS. LA FRANCE: I would -- I would ask, because the jury may be wondering, now wait a minute, we heard about these prior convictions, now he doesn't have them? And that's -- that's another reason why I put it just, albeit, briefly in my opening. Just, you know, he does have prior convictions he's stipulated to and that's pretty much all I say about prior convictions. But they are aware, I mean, it's out there, the cat is out of the bag that he has prior convictions.

What they are was never told to the jury, except for I think one woman who had come up, who was excused anyway because of the nature of her issue with jury selection, we had told her [12] that there was a burglary conviction as well, but other than that they were just told that there were two prior theft convictions. So they don't know the extent of what those theft convictions were.

MS. KOWALEWSKI: I mean, that -- I -- that is accurate, Judge. A as of yesterday my client had not been willing to stipulate, he changed his mind this morning. I don't know what, I mean -- I think that the issue that Mr. Perry had was the nature of the prior convictions are very similar to what he's charged with now. So that -- I think that that's the issue.

THE COURT: What? You lost me.

MS. KOWALEWSKI: I mean, I don't know what the solution to this problem is. I mean --

THE COURT: Well, I think what I -- in other words, it seems to me the State has a point, that if the jury

was told yesterday that there was going to be some proof of prior convictions and that was done because there was no stipulation by the defendant and the State -- and that's an element of the offenses in the absence of a stipulation and the jury was told that, I think I need to say something to the jury. Otherwise they might -- that could be prejudicial to the State. The jury might think, well, wait a minute, I thought they were supposed to prove, you know, three prior convictions, now they haven't proved [13] it.

MS. KOWALEWSKI: I mean, I guess a solution to the issue would be to say look, you know, there was a stipulation, there's not going to be any proof being presented about prior convictions because there's a stipulation. Would that be --

THE COURT: No. That -- I mean that's --

MS. KOWALEWSKI: I mean, that gets into -- but then, you know --

THE COURT: Why don't I just tell the jury, look, you heard some evidence about -- you heard some reference made to prior convictions I'm going to instruct you that that is not going to be a matter that you will be required to deliberate on. That will be -- that will be --

MS. KOWALEWSKI: That's fine.

THE COURT: -- there will be no -- there will be no mention of that. There will be no proof of that, you don't have to deliberate on that.

MS. KOWALEWSKI: That's fine.

THE COURT: Okay.

MS. KOWALEWSKI: And I apologize for the timing -- the timing of things.

THE COURT: All right. That's fine. Now the other thing is this. How long is this case going to take to try?

[14] MS. KOWALEWSKI: I don't think it's --

MS. LA FRANCE: It probably will be more than a day.

THE COURT: Okay. The only thing you need to understand is I -- and I apologize for this, but I was not -- you know, I wasn't involved when the jury was picked. I need to leave today by two o'clock, so we're not going to be able to go this afternoon.

I mean, I can go a little later. Instead of taking a lunch break, I could go like, you know -- I could take a couple of breaks, shorter breaks and then just stop at two o'clock, but

MS. LA FRANCE: I think we originally scheduled for two days anyway, Your Honor.

THE COURT: All right. And then we'll resume again tomorrow.

MS. LA FRANCE: Yeah. And the only -- the only issue is, Your Honor, my victim has been flown in specifically from Ohio and he's due to leave tonight, so he's my first witness.

THE COURT: Okay.

MS. LA FRANCE: I just -- we need to get --

THE COURT: Okay. We'll get -- we'll get him on and off.

MS. KOWALEWSKI: Thank you.

[15] THE COURT: Very good.

MS. LA FRANCE: Thank you.

THE COURT: All right. Let's bring in the jury.

THE CLERK: So am I not reading --

THE COURT: Yeah, you're not reading -- yeah, just scratch out, you know, after --

Clavijo. Is that correct? Is that how you pronounce the victims name?

MS. LA FRANCE: Clavijo.

THE COURT: Clavijo. Okay. Great. Thank you.

Appendix H

(Counsel and court monitor confer.)

(Jury present in court at 10:26 a.m.)

(Jury sworn.)

THE CLERK: Members of the jury may be seated. Mr. Perry, please remain standing.

Ladies and gentlemen of the jury, please listen to the following charges:

The indictment and docket number 2008-S-1797 alleges that at the Superior Court at Nashua within and for the county of Hillsborough, aforesaid, in the month of October of the year 2008, the grand jurors for the State of New Hampshire on their oath present that Barion Perry of Manchester, New Hampshire, on or about the 15th day of August in the year 2008, at Nashua, in [16] the county of Hillsborough, aforesaid, did commit the crime of theft by unauthorized taking in that Barion Perry, with the purpose to deprive the owner therefore, exercised unauthorized control over Punch Speakers and Sony Amplifiers, the property of Alex Clavijo, by breaking into Alex Clavijo's vehicle and removing the items, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

The information in docket number 2008-S-1798 alleges that Barion Perry of Manchester, New Hampshire, on or about the 15th day of August in the year 2008, at Nashua in the county of Hillsborough, aforesaid, did

commit the crime of criminal mischief in that Barion Perry, having no right to do so nor any reasonable basis for belief of having such a right, purposely damaged the property of another by smashing a window of Alex Clavijo's motor vehicle with a pecuniary loss in excess of $100, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

Ladies and gentlemen of the jury, the defendant, Barion Perry has been arraigned on these charges and had pleaded not guilty to these charges and of this he puts himself upon his country for trial, which country you are.

The county attorney, Patricia LaFrance, for the State [17] [Opening Statements] has joined the issue and you to say by your verdict if the defendant, Barion Perry, is guilty of the crime to where he stands or not guilty. Please listen carefully to the evidence.

Mr. Perry, you may be seated.

THE COURT: Good morning ladies and gentlemen. I was not, as you are aware, I was not the judge that was involved in the jury selection for this case, but it is my understanding that during this -- the jury selection process, there was some mention made or some reference made to the fact that it was alleged in the indictment that the defendant had some prior convictions.

I'm instructing you that there will be no -- that is not a matter that is going to be submitted to you for

your consideration. So the only thing that you will have to deliberate on and render a decision on is with respect to the specific charge that was read to you just now by the deputy clerk. So I just wanted to kind of give you that information at the outset.

Okay. Ms. LaFrance.

OPENING STATEMENT BY THE STATE

MS. LA FRANCE: Thank you, Your Honor.

Good morning, ladies and gentlemen. Another dreary day in New Hampshire. This case is about the proverbial man who is caught red-handed. This case is about the defendant, Barion [18] Perry, who was caught by Nashua Police Officer Nicole Clay, carrying some amplifiers that belonged to Alex Clavijo in basically the middle of the night last August 15th.

Before I talk to you about the State's case and what the State will prove, I just want to go over the elements of the crime that the State must prove -- both crimes that the State must prove. That way you keep it in mind as you listen to the evidence.

And I would ask you to remember that the State has to prove every element of both crimes beyond a reasonable doubt. However, keep in mind that the State does not have to prove every fact beyond a reasonable doubt, just the elements of the crime.

So the first element -- the first crime that the defendant is charged with what is called theft by unauthorized taking. And again, once you hear all the evidence, the State will prove all elements of both crimes of beyond a reasonable doubt.

Now the first element of the crime of theft by unauthorized taking is the defendant has to act with the purpose to deprive another of their property. Now purposely is a specific intent and Judge Lynn will give you instructions at the close of the evidence and after the arguments -- the closing arguments and he will instruct you about the definition of what [19] purposely is.

And so the first element is that he has to act with a purpose to deprive an owner and with that he exercises unauthorized control over the property of another. That's essentially it, just acting with a purpose to deprive that person of their property.

And in this case we are alleging that he exercised unauthorized control over the property of Alex Clavijo, whose name you heard when deputy clerk heard when deputy clerk read the indictment.

The second element -- I'm sorry, the second crime -- the elements of criminal mischief are that the defendant, having no right to do so nor any reasonable basis for belief of having such a right -- that's kind of long word. Basically it means he didn't have a right to do that. What he does is he purposely -- again that same intent, he purposely damages the property of another. And in this case we're

alleging that the damage to the -- to Mr. Clavijo's vehicle was over $100, so that's what he's essentially charged with is smashing Alex Clavijo's window.

So those are the elements of the crimes that the State has to prove beyond a reasonable doubt. So who will you hear from? First you're going to hear from Alex Clavijo. He is a young man. He -- at the time this took place on August 15th of [20] last year, he was living in Nashua over on West Hollis Street, probably a stone's throw from here.

He was living -- it was an apartment building and he was awoken by his neighbor and he went down -- upon what he heard from her, went down to discover that his car had been broken into. Now Alex at this time does not live in the state of New Hampshire any more. He was flown in from Ohio, so this is the reason why you're going to hear from him first. It's kind of out of chronological order, but he's going to go first because we need to get him on a flight back to Ohio. I guess the weather is better out there.

So he's going to tell you that, again, he was awakened by his neighbor. He sees his window smashed and he sees wires hanging out of his trunk. And he will tell you that he spoke to a police officer who had responded for the report. And he's going to tell you something else; he's going to tell you something a little quirky about his car, that the windows don't really work. And he'll tell you that he left his windows rolled up and his windows don't really work too well and actually neither do the doors. And he actually has to use kind of a set of pliers to roll

down his windows and then he actually has to reach out an open the door from the outside to get out of his car. So that's kind of something quirky about his car. So he [21] does keep a wrench in his car for that purpose so he can actually get out of his car.

So he will tell you that when he spoke to the officer, she showed him a number of items, and you will see the items -- you see this big speaker over here, he sees there's a couple of items in the box. Alex will tell you that those are his items. The last time he saw them was on that night and that they were in his car and that those are items that Officer Nicole Clay had shown to him.

So he will also tell you that to replace his window, he was estimating it at approximately 150 to $180. And you will also see photos of the damage that was done to his vehicle.

There were two I guess you could call them eyewitnesses, Nubia Blandon and her husband Joffre Ullon, I hope I'm pronouncing his name right. They were neighbors of Alex's, they knew Alex, he lived across the hall from them. And Joffre will tell you that he was up early that morning, he had to go out of town and he was up -- before he left he was going to get his wife a coffee. So when he was in the parking lot he saw a person he later identified as that defendant walking around looking in the cars. And he actually pretty much confronted him face to face.

He will tell you that he was able to identify him that [22] night, but also he later identified him in a photo

lineup that was presented to him by the Nashua Police Department. And he will tell you again, that as he left to go get the coffee he saw the defendant walking around looking in windows of cars.

His wife Nubia will tell you that she had gotten up with her husband and was actually looking out the window and observed a person that she would later point out, the defendant, as going around looking in cars. And she will tell you that she saw him take something out of Alex's car. She knows Alex, she knows what his car is and she only could describe it as something big out of his car.

And again, she told the police officers, she pointed out the defendant, who was at that time talking to another police officer, that he was the person she saw looking in cars and ultimately take something out of Alex's car. Nubia will tell you – and both Nubia and Joffre they are -- I believe Spanish is their original language. Nubia doesn't speak English very well, she uses a translator -- she used -- actually that night when the police came, Alex, who also speaks Spanish and speaks English, translated for her -- for her. Today there is a translator here to translate for Nubia. Joffre speaks English a little bit better, but he's also going to use the translator today just in order to make sure we get the correct information to you folks, [23] because we want you to have the correct information. Joffre does speak English, but he's going to use a translator today just to make sure.

So those are the civilian witnesses you will hear from. You will also hear from two police officers who investigated this case. The first one was Office Nicole Clay.

Now she wrote this report -- and I'm sorry, another thing Nubia will tell is that she called the police and then she had her husband call because the police weren't understanding her. So eventually the police were called and they came to the scene. Now this was about quarter of three in the morning that this was taking place.

So the police responded, Officer Nicole Clay responded to the scene. And she'll tell you that when she responded to the parking lot she at first heard this metal clang and then she saw the defendant walking between two vehicles and in his hand he's carrying what appeared to her to be two amplifiers, one was red and one was black. Behind him she noticed a black bat on the ground.

Now the defendant told her and she will tell you the defendant claimed he found them on the ground and he says he told her that he had seen two men and they had actually dropped the bat on the ground. Officer Clay will tell you that she tried -- she saw one man that the defendant pointed out, she did go and [24] speak with him. She also spoke to Alex that night and Nubia and Joffre and based on their information and what she learned from them -- and remember you will hear from Joffre and Nubia who identified the defendant as the person looking in the cars, she arrested the defendant.

And as she was arresting him -- now what is procedure is usual when somebody is arrested, they get frisked. I'm sure you've seen it on "Law & Order" and all the police movies a million times, they do get pat frisked for safety to make sure they don't have any weapons or

anything like that on them. And as she was frisking him she found -- she felt something in his pocket, something hard, it felt like a small tool. And Officer Clay asked the defendant what it is, and he says, oh, it's a wrench he uses to fix his bike. And she takes it out and it is a small wrench.

She in the meantime had heard from Alex about his quirky little car and how he uses this wrench. Alex will tell you and Nicole Clay will tell you that she showed the wrench to Alex and he identified it as his, the wrench that he uses to crank down the window of his vehicle. So Officer Clay will tell you that she found that wrench in the defendant's pocket.

Officer Clay will also say that in the parking lot she found this big wooden box containing two speakers and again you [25] see that -- that's the gray item down there. Alex will tell you that that's the box that was in his vehicle. It's on a trolley, it's very heavy, so that's why it's on a trolley. And Alex will say that was the speakers that were in his car.

And you will see -- again, you will see all these items, the State will enter these into evidence.

And lastly you will hear from Detective Lakeisha Phelps. She was assigned to investigate this matter and she spoke to the defendant a couple of times. Since he was in custody, under arrest, she read him his *Miranda* rights and she actually ended up speaking to him twice to kind of clarify some things he was telling her. And he insisted that he didn't take the items and he insisted now

that there were three men running through the parking lot and these men were running prior to Officer Clay's arrival in that parking lot. And again, he also claimed that the wrench was his.

And her second conversation with him, she wanted to clarify a few things. He had said he was coming from a cousin's house. She wanted to clarify why he went one particular route when it's not exactly the direction from where he says he was coming from to where he was going.

So you will hear Detective Phelps talks about his statements to her. And you will see his statement on -- both [26] statements on video.

And lastly Detective Phelps will also tell you that she did present a photo identification to Joffre and Nubia. And Joffre, who you remember had seen the defendant close up, was able to identify him as well in the photo lineup. Nubia, who had seen him out her window, could not identify him in the photo lineup.

So that essentially will be the straight -- the State's case. A pretty straightforward case, but it is important to both parties. I ask you to listen to the evidence and at the end of the State's case I would ask that you find the defendant guilty of both counts. Thank you.

THE COURT: Thank you. Ms. Kowalewski.

OPENING STATEMENT BY THE DEFENDANT

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MS. KOWALEWSKI: Thank you. Good morning, folks. This case is about a couple of things. It's about -- the most important thing is that it's about being in the wrong place as the wrong time. It's about the wrong identification, an inaccurate identification and it's about wrong charges and not being able to prove those charges. And those things mean that Barion is not guilty.

On August 14th, Barion did what he usually did. He woke up that morning, spending the night with his three children [27] and their mother. When they were ready to go to work and daycare, he sent them off and he got dressed and ready for the day. He put on a shirt, put on pants, his sneakers and he made sure that he had his two wrenches with him because his sole method of transportation with the most efficient method of transportation is his bike. And if he loses that bike he knows he's in trouble because, unfortunately, Southern New Hampshire doesn't really have a very good public transportation system.

So he knew that he had to be prepared if his bike got wrecked or there was something wrong with it. So before he left the house that morning he made sure that he had those wrenches. Pretty common wrenches, wrenches you can get from any Home Depot or any hardware store anywhere.

So the children go to daycare, girlfriend goes to her job and what does he do? Gets dressed, gets on his bike and he starts heading down Amherst Street to go to his mom's house on Lock Street. His mom was having a barbeque that day, family, friends, everybody was going to

be there. On the way there his worst nightmare happened, got a flat tire. Couldn't -- didn't have the tire fixed, didn't have a pump, so he left his bike there and continued on to his mom's residence. Spent some time at his mom's house enjoying the company, enjoying the food. It was his first time having cube steak and he was really, really [28] excited about it.

And he was also excited he got a ride to Cash Converters in Hudson and while there he purchased his own amp and his own speakers, because a hobby of Barion's is to purchase cars that are being sold very cheaply from the dealers and restore them. That's a hobby of his. So he got a ride to Hudson, purchased his amp, came back, hung around in the tree streets for the rest of the day.

Now I don't know if you guys know the tree streets in Nashua all that well. It's a pretty close knit community. It's call the tree streets because they're named after trees, Elm Street, Walnut Street, Ash Street. And the way that it's set up, it's old house, the three, four-story type of houses built there, they're built really close together. If you're driving down West Hollis Street you can see how they're set up. But what you often can't see is behind these houses are alleyways and there's the bike path and these are completely open to the public.

People drive down there, they park their cars, they walk through there. It's not unusual to see people going through that -- those alleyways at all hours of the day and night. It's also a pretty close knit community, people know each other. And that's what Barion was doing that night.

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He was walking to visit his cousin and he was going to [29] cut through this alleyway and get to where he was going a little bit quicker. As he's walking through the alleyway he says three guys ahead of him, thinks he may know them. Can't catch up to them, gets into the alleyway -- again people drive through this alley -- alleyway all the time. And as he's driving there he sees this big amp in the middle of the -- in the middle of the parking lot, right in the middle where people drive.

So what does he do -- then he hears, stop what are you doing. I was just moving the stuff, I'm sorry. Told the police officer he didn't break into a car, he certainly didn't smash out anybody's windows and he certainly didn't purposely damage property to get someone else's property.

You'll see that the evidence supports that. Ms. Blandon Castro, who is the eyewitness that the State needs you to believe can't pick him out of a photo array. How carefully did she really see what was going on? Can't tell you how the person got the trunk open, doesn't hear a sound of glass smashing. How well could she really see him? How well could she really hear?

Unfortunately, the police don't do a lot of forensic evidence to back up Ms. Blandon Castro. They don't fingerprint anything that they find, they don't fingerprint the stereo. They don't fingerprint the bat, they don't fingerprint the inside of the car.

[30] Because basically what they're saying is that Barion smashed out the back window of a two-door Honda

Civic, climbed through the window, popped the trunk, climbed out through the passenger window and then got that.

Now when you're listening to that, think about how tall he is. He's not a small guy. It's an incredible story. Imagine trying to climb through the back window of a two-door Honda Civic without being seen.

The State also talked to you a little bit about Joffre and what they neglected to tell you is that he wasn't around for the supposed break in. He left, comes back maybe forty-five minutes later, doesn't see anything that goes on.

This is a case where the State is asking you to believe an incredible story. A story about a man that's over six feet tall dragging his whole body through a small window. The State simply can't prove that Barion smashed out that window, climbed through it, popped the trunk, climbed out the passenger window and stole those items. He was in the wrong place at the wrong time. Thank you.

THE COURT: Thank you, Ms. Kowalewski. Ms. LaFrance.

MS. LA FRANCE: The State calls Alex Clavijo.

(Pause in proceedings.)

ALEX CLAVIJO, WITNESS FOR THE STATE, SWORN.

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[31] [Clavijo - Direct] MS. LA FRANCE: Okay. Please be seated with the Court's permission.

THE COURT: Yes. Please have a seat.

DIRECT EXAMINATION BY MS. LA FRANCE:

Q. Could you tell us your name please and spell your last name for the court reporter?

A. My name is Alex Clavijo. My last name is spelled C-l-a-v-i-j-o.

Q. And Alex, what state do you currently live in?

A. Ohio.

Q. Okay. And how did you get here today?

A. I flew. Airplane.

Q. Okay. And when are you scheduled to fly back to Ohio?

A. Today.

Q. Okay. I want to ask you about last August in 2008, where were you living at that time?

A. 70 1/2 West Hollis Street.

Q. And that's in Nashua?

A. Yes, it is.

Q. And what kind of building is 70 1/2 West Hollis Street?

A. Right across from the new building.

Q. But what is it? Is it a house, is it an apartment building?

[32] A. An apartment.

Q. Okay. And what floor did you live on?

A. The third floor.

Q. Okay. And did you own a car at that time?

A. A black Honda Civic.

Q. All right. And where would you park the car?

A. In the back parking lot.

Q. Okay. And at that time was there anything quirky about the windows and doors in your car? Anything weird about the windows and doors? Were they functioning properly?

A. No.

Q. Okay. Could you tell the jury please how you got in and out or at least out of your vehicle.

A. I didn't remember. The car cannot be -- it cannot be opened from the inside. In order for you to open it from the inside you have to lower down the window and stick out your hand and open it from the other side of the door. And then I had -- what's it called? I had a wrench to pull down the windows with it.

Q. Okay. And why did you need to use a wrench?

A. Because the door panels were not there, they were missing.

Q. Okay. And at that time did you know a person by the [33] name of Nubia?

A. My neighbor?

Q. Yes.

A. Yes, I did.

Q. Okay. And where did she live?

A. She lived right across the hallway from where I used to live at. Which --

Q. And that's at 70 1/2 West Hollis?

A. 70 1/2 West Hollis Street. I lived in Apartment 43, so I'm guessing hers is 42, probably, 44.

Q. All right. You're not sure what her --

A. I'm not sure of the number, but she was right across -- she lives right across from where I used to live at.

Q. Okay. And do you know whose apartment faced out to the parking lot?

A. Hers.

Q. Okay. And I want to talk to you about early morning on August 15th, 2008. This was probably a little before 3 a.m. Did you speak to Nubia at that time?

A. Yes, I did.

Q. Okay. Can you tell the jury please what were the circumstances of you speaking to her at such an early -- so early in the morning?

[34] A. She knocked on my door and she --

MS. KOWALEWSKI: Your Honor, may we approach?

THE COURT: Yes. Sure.

MS. KOWALEWSKI: Anything that Ms. Castro says to him is hearsay.

MS. LA FRANCE: Well, I'm -- I didn't get there yet, but I was going to instruct him to repeat anything she told him, but just what action he took. So any -- if it was -- it's not hearsay because it's just to show what action he took after the fact.

THE COURT: Yeah. It's not offered for the truth of the matter, it's offered just as a basis of what -- what action he took and I'll instruct the jury to that.

MS. KOWALEWSKI: Okay. Please. Thank you.

MS. LA FRANCE: Thank you.

THE COURT: Ladies and gentlemen, apparently this witness is going to tell us something that he heard -- that somebody told him, this Nubia told him. You're instructed that that -- you cannot consider that matter for the truth of what she may have said to him because that would be hearsay. What you can consider it for is as on the -- as a basis upon which he took some action.

In other words, whether it was true or not, he's [35] probably going to say she said something to him. You can't consider what she said to be the truth, but you can consider it as why he did what he did after -- after having been told that. You may consider it for that limited purpose. Okay. Go ahead.

MS. LA FRANCE: Thank you, Your Honor.

BY MS. LA FRANCE:

Q. Before the objection you had said that you spoke to Nubia early that morning.

A. Yeah. Yes, I did.

Q. Describe the circumstances. How did you make contact with her?

A. She knocked on my door.

Q. Okay.

A. She woke me up, she told me they're stealing -- they breaking into your car. And I got up, I went, checked my car. My left back window was shattered.

Q. Okay.

A. My driving window was down.

Q. Okay.

A. And my wires were hanging out my back trunk.

Q. All right. Let's go back a little bit. You said that Nubia woke you up. Were you sleeping at the time?

A. Yes, I was.

[36] Q. All right. And when you went downstairs -- so you were coming from the third floor?

A. I was coming from the third floor down.

Q. All right. So what happened when you went out to your car? What did you see?

A. My left back window was shattered. My driving window was down. My trunk was like cracked open and my wires were hanging out.

Q. Okay. What was -- what were the wires from?

A. A music system.

Q. Okay. And can you describe the music system that you had in your car?

A. It was two twelve-inch Punches, two amps -- red amp Xplod Sony, black amp Xplod Sony, 1,200 watts and it was the whole box.

Q. You like your music system, right?

A. Yeah. I do.

Q. You know about speakers and everything it appears. Okay. And just -- just for those of us who don't know much about electronics, what's Punch -- what's the Punch speakers?

A. It's a -- it's a system. There's different ones. There's Kickers, there's Punches, there's Sony, there's all types of different systems and that's the one I had.

[37] Q. Okay. And how were these set up in your car?

A. They were in the trunk.

Q. Okay. So they were just twelve-inch speakers sitting in the trunk?

A. Twelve-inch speakers in the car with amplifiers, one for voices, one for the subs.

Q. Okay. And where were the speakers specifically? Were they just sitting by themselves, just two twelve-inch speakers sitting --

A. In the car, yes. In the trunk.

Q. Okay. Were they enclosed in anything?

A. No.

Q. Okay. So when you got down to your car, what was missing, to your knowledge?

A. My system was missing and my bat was missing and my wrench.

Q. Okay. And at that time were you able to speak to a police officer?

A. Yes.

Q. Okay. Where did you end up speaking to the police officer?

A. In the parking lot. And then --

Q. And did she -- at any point, did you go back upstairs?

[38] A. Yes, we did.

Q. Okay. When did you go back upstairs?

A. Probably a few minutes right after.

Q. Okay.

A. I don't remember exactly.

Q. When you went back upstairs, whose apartment building -- who apartment did you go to?

A. I went to my apartment and then we were talking to my neighbor.

Q. Okay. Who -- what neighbor were you talking to?

A. I can't pronounce her name.

Q. Was it Nubia?

A. Nubia, yeah.

Q. Okay. And where was Nubia when you were speaking -- when you and the officer were speaking to her?

A. We were in the hallway talking.

Q. Okay. So the hallway outside whose apartment?

A. Both of ours, we were right there.

Q. Oh, okay. So do your doors pretty much face each other?

A. Yeah.

Q. Okay.

A. Right in front of each other.

Q. Now does Nubia speak English?

[39] A. No. She does not.

Q. Okay. How was she communicating with the officer?

A. I was translating for her.

Q. Okay. You speak Spanish and English?

A. I speak both.

Q. Okay. Do you know if the items from your car were recovered?

A. Like if I had got them back?

Q. No, not if you had got back. Did the police recover the items from your car?

A. Yes, they did.

Q. Okay. And who showed you -- did anybody show you the items?

A. No.

Q. Okay. Do you remember -- how did you identify these items?

A. I seen them.

Q. Okay. How did you see them?

A. At the parking lot.

Q. Okay. And where were they when you saw them?

A. One -- the subs were in the corner by a bike and the amplifier in the back -- he was carrying it.

Q. Okay. And --

[40] THE COURT: I'm sorry. Who was carrying it?

THE WITNESS: He was.

BY MS. LA FRANCE:

Q. Okay. Did you actually see him carrying the amplifiers?

A. Yes, I did.

Q. Okay. And were was the officer at this time?

A. They were -- there was another officer talking to him and Detective -- not Patricia -- Detective -- I forgot her name.

Q. Okay. Was there a detective there at the time?

A. Yeah, there was two officers.

Q. Okay. And what was the officer you spoke to? Was it a man or a woman?

A. It was a woman.

Q. Okay. Was she a younger officer or an older officer?

A. Young officer.

Q. Okay. And was she black or white?

A. White.

Q. She was white. Okay. All right. And so at that time did she show you any items that were in your car? If you recall? And do you don't remember, it's okay, if you don't remember specifically. It's okay to say you don't remember.

A. Like if she showed me what I was missing?

Q. Right.

[41] A. No. I told her. I'm like I'm missing -- I'm missing my stuff. I'm missing my system, my amps, my bat, my wrench; I don't know where it's at.

Q. Okay. And were you able to describe those things to her?

A. Yeah.

Q. Just as you described them to the jury?

A. Yes, I did.

Q. Okay.

MS. LA FRANCE: Your Honor, may I approach?

THE COURT: Yes.

MS. LA FRANCE: I asked that this be marked for identification as State's 1.

THE COURT: Okay. Any objection?

MS. KOWALEWSKI: No objection.

THE COURT: Sure. It may be marked for identification as State's 1.

(State's 1 marked for identification.)

BY MS. LA FRANCE:

Q. Okay. Alex, I'm showing you what's been marked just for identification as State's 1. Do you recognize this?

A. Yeah. It's mine.

Q. Okay. And where did you keep this?

[42] A. In my car.

Q. All right. And when is the last time you saw this bat?

A. Last year. Last year.

Q. And was -- the last time you saw this bat, was it the same night that we've been talking about?

A. Yes.

Q. Okay. And do you know who took this bat, who has had this bat since then?

A. You guys for evidence.

Q. Okay. So you haven't gotten it back?

A. I haven't gotten it back.

Q. Okay.

MS. LA FRANCE: Okay. I ask that this be marked as State's 2 for identification.

MS. KOWALEWSKI: No objection.

THE COURT: All right. State's 2 for identification.

(State's 2 marked for identification.)

BY MS. LA FRANCE:

Q. Alex, I'm showing what has been marked for identification as State's 2. Do you recognize that item?

A. Yes, I do.

Q. Okay. What is it?

A. It's my amplifier.

[43] Q. Okay. And you had spoken previously about two different amplifiers.

A. Yes, I did.

Q. Okay. What was the purpose for you to have this amplifier?

A. That one is for voices and the other one was for the subs.

Q. For the sub --

A. For the sub-woofers.

Q. Okay. And when was the last time you saw these --

A. Last August.

Q. Okay. Was it the same night that you discovered your windows smashed?

A. Yes, it was.

Q. And again, to your knowledge who took this the night -- that night? I'm sorry, after you identified it -- I'm sorry. Who has had it since then?

A. You guys.

Q. Okay. And when you identified this, was this the item that was in your vehicle the night of August 15th?

A. Yes, it was.

THE COURT: And am I understanding sir, that that was in the trunk?

[44] THE WITNESS: Yeah.

THE COURT: In the trunk. Okay. All right.

BY MS. LA FRANCE:

Q. And just actually if we could kind of -- actually, if you could kind of go over -- now there seem to be plugs here. What goes into those?

A. Those are the system wires plugs. You put them for audio, voice and then you put the other wires to here for the subs or for the speakers.

Q. Okay. All right. And where were those wires?

A. They were hanging off my trunk.

Q. Okay.

MS. LA FRANCE: I would be asked that this be marked for identification as State's 3.

THE COURT: Yep.

MS. KOWALEWSKI: No objection.

THE COURT: All right.

(State's 3 marked for identification.)

BY MS. LA FRANCE:

Q. Alex, I'm showing you what's been marked for identification as State's 3. Do you recognize that?

A. Yep.

Q. Okay. What is that?

[45] A. That's my other amplifier.

Q. Okay. And what was the purpose that you had this amplifier for?

A. For the speakers. For the subs.

Q. Okay. So this is the one that attached to the --

A. To the speakers and the other one was attached to the speakers in the car.

Q. Okay. So just so I understand, when you -- when you say the subs --

A. Those are the subs and then the other one was attached to the speakers.

Q. Okay. So subs and speakers are --

A. Different.

Q. Okay. And again there seems to be some plugs on this and I'm not sure I'm calling it the right name, but what goes in there?

A. The wires to the radio.

Q. Okay. And August 15th where were those wires?

A. Hanging off my trunk.

Q. Okay. And I'm sorry, Alex, when was the last time you saw these -- this amplifier?

A. August. August, the night of the incident.

Q. Okay. And the -- was the August -- was that the same [46] day you're talking -- when the window was smashed in your car?

A. Yes.

Q. Okay. And to your knowledge, who has had that amplifier since?

A. You guys.

Q. Okay. When you say you guys, who are you -- are you talking about the State or the police?

A. The police, the State.

Q. Okay. But you haven't had --

A. I haven't had it.

Q. Okay.

MS. LA FRANCE: I asked that this be marked for identification as State's 4.

THE COURT: Okay. Let it be marked.

(State's 4 marked for identification.)

BY MS. LA FRANCE:

Q. Okay. Alex, I'm showing you what's been marked for identification as State's 4. Do you recognize that?

A. Yes, I do.

Q. Okay. What is that?

A. A wrench.

Q. Okay. And whose wrench is that?

A. Mine.

[47] Q. Okay. And what did you use this wrench for?

A. To roll down my windows.

Q. Okay. Was that the wrench you were describing to the jury earlier that you used to kind of get out of your car?

A. Yes. It was.

Q. Okay. And when was the last time you saw this wrench?

A. Last August.

Q. Okay. Was that the same night we are talking about where your windows to your car were smashed?

A. Yes, it is.

Q. All right.

MS. LA FRANCE: Okay. This is going to be entered -- Your Honor, I ask this to be -- I ask this to be marked for identification as State's 5.

THE COURT: All right. Let it be marked.

(State's 5 marked for identification.)

MS. LA FRANCE: And with the Court's permission could the witness step down?

THE COURT: Yes. Absolutely.

BY MS. LA FRANCE:

Q. Alex, I'm showing you what's been marked for identification as State's 5. Do you recognize this?

A. Yeah.

[48] Q. Okay. What is it?

A. My Punches, twelve-inch subs that were in my car.

Q. Okay. So when you say it's your Punches, your twelve-inch Punches, can you explain what that means to the jury?

A. It's a system to the car.

Q. Okay. This may seem like a silly question. Why do you call it a twelve-inch Punch?

A. Those are the name brand of it.

Q. Okay. It does -- I mean, does it mean this is twelve inches? Is that --

A. Yeah.

Q. Oh, okay. So the speakers come in different sizes?

A. Yeah, there's tens, there's twelves and there's fifteens.

Q. Okay. So these are two separate speakers?

A. Yep.

Q. Okay. And can you tell me, what is this gray kind of box like --

A. It's the box to it -- it's the custom box to it.

Q. Okay. Well, where did you get the box from?

A. I bought the whole thing like that.

Q. Oh okay. All right. But you said it's custom.

A. Yeah.

[49] Q. Okay. And when -- where was -- where were these speakers?

A. In the trunk of my black Honda Civic.

Q. Okay. And when is the last time you saw these speakers before today?

A. Last August.

Q. Okay. Was that the same night where -- that we're talking about where you found your car windows smashed?

A. Yep.

Q. Okay. And you said -- where were these in your car?

A. In the trunk.

Q. Okay. Now I'm noticing here, for the record, I guess the side opposite from where the speakers are there are some wires. Okay. Where do those wires go?

A. Those connect to the amp.

Q. Okay. Those connect to these two things.

A. Yeah.

Q. All right. So these -- the wires hanging out of the speakers connect to State's 2 and State's 3?

A. Yep.

Q. Okay. And that's obviously so they all work together, right?

A. Yep.

[50] Q. All right. Okay. And you said the last time you saw this was in August? That's the night we're talking about where your car window was smashed?

A. Yep.

Q. Okay. And how heavy are these?

A. Heavy.

Q. Okay. Now, Alex, as you identify each item, State's 1 through 5, where were all those items?

A. In my car.

Q. Okay. And on August 15th, the night that Nubia came knocking on your door where were they? Before -- prior to you finding out -- obviously they're here now, but where were they supposed to be?

A. In my car.

Q. Okay. And did you give anybody permission to take those items out of your car?

A. Nope.

Q. Okay. Did you give any permission -- did you give permission to anybody to smash the windows of your car?

A. Nope.

Q. Okay.

MS. LA FRANCE: One moment, Your Honor.

THE COURT: Okay.

[51] BY MS. LA FRANCE:

Q. Alex, you have said that your window to your car was smashed. Okay. Did you ever get it fixed?

A. Nope.

Q. Okay. About how much would it have cost to fix it?

A. A hundred -- a hundred and something.

Q. Okay.

A. Maybe 130, 150, I don't know.

Q. Okay. But it was -- just so we understand, what was -- what was broken? Was it just a little crack? Or --

A. The whole thing was shattered.

Q. Okay. All right. And what happened -- and you said -- I'm sorry, what kind of car did you drive?

A. A Honda Civic.

Q. Okay. What color was it?

A. Black.

Q. Okay. What happened to that car?

A. I got rid of it.

Q. Okay.

A. Right after the -- what happened.

Q. Okay. So you never -- you didn't fix the windows thought?

A. No.

[52] [Clavijo - Cross] Q. Okay. And were you able to get as much money for it as you would have if the windows hadn't been broken?

A. Nope.

MS. LA FRANCE: Thank you. I have no further questions. You may inquire.

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THE COURT: Cross-examination.

CROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. I want to talk a little bit about your car. Two doors, right?

A. Yeah.

Q. Okay. And the window that was broken -- smashed, was the window that was above the -- it was on the driver's side, right?

A. It's on the left hand side, it's the back window, the little window.

Q. Okay. The little window. When you say little, how little?

A. It's not that little. I could fit through there.

Q. How little is little?

A. I can't describe it. It's like that pretty much. Kind of like that. It's like a coupe.

Q. Okay.

A. A Honda Civic coupe.

[53] Q. Okay. And when you say shattered, it was -- there was glass everywhere and a hole --

A. Yep.

Q. -- pretty much a hole, right?

A. Yep.

Q. Okay. It sounds like your car, had -- you had kind of a different way of getting in and out of it, right?

A. Yeah.

Q. Can you describe again how you -- how to get in and out of your car?

A. I opened the doors. The car cannot be opened from the inside.

Q. Okay. So if it's locked from the inside --

A. You cannot -- you can open it from the outside with the key, but you cannot open it from the inside.

Q. Okay. So if you're driving and the -- your door is locked --

A. Yeah.

Q. -- you would have to roll down the window, right? Take the key out of the ignition and kind of reach out and open the door. Unlock it that way because you couldn't unlock it from the inside, right?

A. Exactly.

[54] Q. Okay. And both doors were like that, right?

A. No, not the other one. The other one you could actually open and close it.

Q. Okay. Even when it was locked on the inside?

A. No. Not the inside though.

Q. Okay. So you would have to kind of use the key also on the passenger side door, right?

A. In a way, yeah.

Q. Okay. Okay. Now I want to -- you spoke with a white female officer that night, right?

A. Yes, I did.

Q. Okay. And she told you that she was investigating what had happened, right? You remember talking to her.

A. Yes, I do.

Q. And do you remember her asking you if you had seen anything that had happened?

A. I'm -- I ain't going to say I did see what happened, because I didn't.

Q. Okay.

A. But when I went downstairs and I seen my window smashed, I seen him with my stuff in his hands.

Q. But you told her you didn't see or hear anything, right?

A. I didn't see or hear anything.

[55] Q. Okay. Okay. How many police officers were there that night?

A. Like two and a probably another cruiser came by.

Q. Okay. So --

A. A couple cruisers. I don't know, I don't remember exactly.

Q. Okay.

A. But I know there was more than one officer there.

Q. Okay. And you were -- and they were dressed in uniform, right?

A. Yeah.

Q. Now the uniform is dark blue top and dark blue pants, right?

A. Yeah.

Q. And they have a badge?

A. Yes.

Q. And they have a patch on the arm that says "Nashua Police"?

A. Yes.

Q. And the belt with the gun, right?

A. Yeah.

Q. Okay. And you saw three of those. Three people with uniforms.

[56] A. Yeah. They were officers.

Q. Okay. And two cruisers, right?

A. Yeah.

Q. And the cruisers had the lights on top.

A. Yes.

Q. And they're dark blue and light blue?

A. Yeah. They were police.

Q. And they have the Nashua Police Department insignia on the side, right?

A. Yes, they do.

Q. Okay.

THE COURT: Ms. Kowalewski, this is probably a good point to take a mid-morning recess.

MS. KOWALEWSKI: Okay.

THE COURT: Ladies and gentlemen, you know what? I realize this was -- you probably weren't told this when you were first drawn, but I'm going to need -- I have a commitment that I have to be in Concord at three o'clock today, so I'm going to leave at two. And what I probably would do -- and I would only do it -- unless -- I mean, if it doesn't cause some problems for you, if you've already made lunch plans or something and tell me and I'll -- we'll -- I'll change my mind on it then.

What I propose to do is, instead of taking a lunch [57] break, which we usually take at 12:30, I would just take a short break a now and probably take a short break at around quarter of one or so and then have -- and continue the trial through to two o'clock when we'll recess for the day. Is that going to present any problem for anybody if we do that?

(No verbal response.)

THE COURT: Okay. And that way we'll try to get sort of the maximum, you know, accomplish as much as we can and then we'll recess for the day at two o'clock. Okay. All right. Thank you.

MS. KOWALEWSKI: Thank you.

(Recess taken at 11:21 a.m.)

(Proceedings resume at 11:33 a.m.)

(Jury present in court.)

THE COURT: Ms. Kowalewski.

MS. KOWALEWSKI: Thank you, Your Honor.

BY MS. KOWALEWSKI:

Q. Now Attorney LaFrance basically told that this was your bat, right?

A. That was mine, yes.

Q. And you said you kept it in your car.

A. Yeah.

Q. Kept it in your trunk, right?

[58] A. In my car, yeah.

Q. In your trunk, right?

A. Yeah.

Q. Okay. And it was in your trunk that night also, right?

A. Yep.

Q. Okay. I want to talk a little bit about this wrench. Where did you buy this wrench?

A. Walmart.

Q. Okay. And it had -- it's a pretty common wrench, you would agree, right?

A. Yeah.

Q. Okay. Now when Nubia told you she saw somebody going into your car, it's fair to say you got upset, right?

A. I was sleeping, I was half asleep, so I was like okay let me go downstairs.

Q. Did it upset you that somebody would smash out your window?

A. Yeah, I was mad.

Q. Okay. Mad enough to get a bat and go downstairs, right?

A. I didn't go downstairs. I went downstairs, but I didn't do anything.

Q. Mad enough to go downstairs with a bat?

A. Yeah.

[59] [Clavijo - Redirect] Q. Okay.

MS. KOWALEWSKI: I have no further questions, Judge.

THE COURT: All right. Did you go downstairs with a bat, sir? Did you take a bat downstairs with you?

THE WITNESS: Yes, I did.

THE COURT: And you took a bat different than that one?

THE WITNESS: Yeah. But I didn't -- I didn't -- I didn't do anything with it. I thought it was -- to be honest with you, if it's in the middle of the night and you're by yourself and they're robbing your car, you probably think it's a few people. You know what I'm saying? But I didn't do anything.

THE COURT: Sure. No, no, I'm just saying. I'm just make sure I'm understanding, you took a bat from up in your house

THE WITNESS: Yeah.

THE COURT: -- that was different than that bat.

THE WITNESS: Yeah.

THE COURT: Okay. All right.

MS. KOWALEWSKI: I'm done. Thank you, Judge.

THE COURT: All right. Redirect?

REDIRECT EXAMINATION BY MS. LA FRANCE:

Q. Alex, just to clarify, the bat that you took, I think you just told Chief Justice Lynn you took it because you didn't [60] [Clavijo - Court Examination] know who was out there breaking into your car.

A. Exactly.

Q. Okay. And so was the bat used just for your protection?

A. It was for my protection, that's all. Just in case there's more than five people. You know, you're by yourself, what you going to do?

Q. Okay. All right. And just to be -- just to be clear, you were able to identify all those items that night as your own?

A. Yeah.

Q. Including the wrench?

A. Exactly.

Q. Okay.

MS. LA FRANCE: Thank you. I have no further questions.

EXAMINATION BY THE COURT:

Q. Now, can I just ask you a couple questions? I want to make sure I'm clear on the timing of things. You -- how quickly -- could you give us some idea of how quickly after Nubia told you, you know, that somebody was breaking into your car?

A. I went downstairs?

Q. How quickly did you go downstairs?

A. I'm -- to be honest, I thought it was a joke, so I went back to sleep for like ten minutes. And then I got up and I went [61] -- I grabbed the bat and I went downstairs to check. And then the police officers arrived right there.

Q. Okay. So and -- did you call the police?

A. No. I didn't know, I was sleeping.

Q. Okay. Do you --

A. I had to work the next morning.

Q. -- do you know who called the police?

A. I think it was Nubia, she called the police.

Q Okay. But by the -- if I'm understanding you correctly, then by the time that you got downstairs, the police were arriving already?

A. Yes, they was.

Q. Okay. All right. And then you mentioned that at some point you saw --

A. When I went downstairs and I started walking towards my car and then I see my car is smashed, I look down the driveway. And I saw a person with my amps in their hand. And right there and then I was going to walk towards him and then the cops -- the police officer -- they were already there.

Q. Okay. So the person that you saw with the -- with the -- what do you call it, the amps?

A. Amplifiers.

Q. Amplifiers in their hand, were the police already with [62] [Clavijo - Recross] that person when you saw him or was that person alone?

A. The police was just getting there, like right at the same time. Like the police officer, I think they seen him

with stuff in his hand. I'm not -- I can't tell you. I saw him with my own eyes that he had my stuff with him in his hand. And right there and then, Detective Phelps came along.

THE COURT: Okay. All right. In light of my questions, any other questions?

MS. KOWALEWSKI: I do.

RECROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. So just so I'm clear, your testimony today is that you came downstairs after falling asleep, right?

A. Yeah. I was sleeping --

Q. And got woken up, right?

A. Woke up.

Q. Went back to sleep.

A. But not like that. I woke up --

Q. Well, kind of dozed off again.

A. Yeah, because I was half asleep, I dozed off, but I woke back up --

Q. For ten minutes.

A. -- for like ten -- five minutes, not even.

Q. Okay. Came downstairs.

[63] A. Yep.

Q. And saw -- came downstairs with a bat and saw somebody with your amps in their hand.

A. Yeah.

Q. Okay. And then you spoke to the officer last night -- that night, right?

A. Yeah.

Q. But you never told her that, right?

A. I did told her that.

Q. So you're saying that you never told her that you had not seen or heard anything?

A. No, I didn't -- I didn't hear nobody breaking into my car, they knocked on my door.

Q. Okay.

A. And they told me, they're breaking into your car.

Q. Okay. But you -- are you denying telling the officer that you did not see anything?

A. I did not see him breaking into the car, I seen him –

Q. And you -- did you tell the police officer that?

A. Yeah, I told him, I didn't see anything. I can't see from the house.

Q. Okay. And you told her you didn't hear anything?

A. I can't hear anything either, no.

[64] Q. Okay. And you didn't -- but you also didn't tell her you saw somebody with your amps. Is that true?

A. I don't remember.

Q. Okay.

MS. KOWALEWSKI: Thank you. I have no further questions.

THE COURT: All right. All right. Thank you very much, sir. You may step down.

(Witness excused.)

MS. LA FRANCE: The State calls Nubia Blandon. Your Honor?

THE COURT: Yes.

MS. LA FRANCE: May Mr. Clavijo be excused? He has a plane to catch.

MS. KOWALEWSKI: I have no problem with that.

THE COURT: Sure. That's fine. Yes, sir. Thank you.

(Pause in proceedings.)

MS. LA FRANCE: Your Honor, I'm sorry, the State will be calling Officer Clay. I believe there was a misunderstanding when I told them you were taking a break.

THE COURT: Okay.

(Pause in proceedings.)

OFFICER NICOLE CLAY, WITNESS FOR THE STATE, SWORN.

[65] [Clay - Direct] MS. LA FRANCE: With the Court's permission.

THE COURT: Yes. Please be seated ma'am.

DIRECT EXAMINATION BY MS. LA FRANCE:

Q. Would you tell us your name please and spell your last name for the court reporter?

A. My name is Officer Nicole Clay, C-l-a-y.

Q. What is your occupation?

A. I am a police officer with the Nashua Police Department.

Q. Okay. And Officer, I'm just going to ask you to kind of keep your voice raised and also if you want to pull that microphone down just so we can make a clear record.

How long have you been a police officer with Nashua?

A. I've been employed there for just over two and a half years.

Q. Are you a certified full-time police officer?

A. Yes, I am.

Q. Okay. And that means you went to the police academy?

A. Correct.

Q. Okay. Which academy did you graduate from?

A. I went to the 143rd Academy and graduated in June of 2007.

Q. Okay. So have you been employed with Nashua your whole police career?

[66] A. Yes, I have.

Q. Okay. Were you employed as a part-time police officer anywhere prior to that?

A. No, I was not.

Q. Okay. And what are you duties as a police officer with Nashua?

A. I'm in the patrol division in the department, so I am tasked with getting into a cruiser every night, patrolling the streets, looking for crime, responding to calls for assistance or reports of crime and dealing with them appropriately.

Q. And what shift are you currently working?

A. I'm currently on third shift. Eleven --

Q. What time?

A. I'm sorry, eleven at night until seven in the morning.

Q. Okay. And when you're riding around do you have a partner or somebody that you ride around with?

A. Generally, no.

Q. Okay. And I'd like to direct your attention back to August 15th early in the morning at approximately 2:45 -- between 2:45 and 3 a.m. Were you working at that time?

A. Yes, I was.

Q. Okay. So you were on the same shift?

A. Yes.

[67] Q. The third shift?

A. Yes.

Q. Okay. And were you dispatched to a particular location?

A. Yes, I was.

Q. Where were dispatched to?

A. I was dispatched to the rear parking lot of 70 1/2 West Hollis Street.

Q. Okay. Could you describe for the jury please what 70 1/2 Hollis Street is?

A. It's an apartment complex located on the south side of West Hollis Street between Ash and Palm Street.

Q. And you said you were dispatched to the parking lot.

A. Correct.

Q. Okay. What was the nature of the call?

A. The report was that there was a black man attempting to gain entry to the vehicles in the parking lot.

Q. Okay. And what did you observe once you got there?

A. When I got there I walked from the front of the building to the back of the parking lot -- to the back of the building where the parking lot is and I heard a loud metal clang and then I saw a tall black man holding two items walking from between two of the vehicles.

Q. Okay. And do you see the person you saw that night [68] carrying those two items in the courtroom today?

A. Yes, I do.

Q. Could you point to him and describe what he's wearing, please.

A. He's sitting at the defendant's table in the middle with the striped shirt.

MS. LA FRANCE: Your Honor, I'd ask the record to reflect that the witness has identified the defendant.

THE COURT: Yes, it may.

MS. KOWALEWSKI: No objection, Your Honor.

THE COURT: All right.

BY MS. LA FRANCE:

Q. So you observed the defendant carrying some items?

A. Yes.

Q. And could you describe the items he was carrying?

A. They appeared to be two amplifiers for a stereo system' one was black and one was red.

Q. Okay.

MS. LA FRANCE: Your Honor, may I approach?

THE COURT: Yes.

BY MS. LA FRANCE:

Q. I'm showing you what has been entered -- I'm sorry, what has been marked for identification as State's 2. Do you [69] recognize that?

A. Yes, I do.

Q. What is that?

A. That is a red Sony Xplod Amplifier.

Q. Okay. And could you just tell me please, is this the amplifier that you saw that night?

A. Yes, it is.

Q. Okay. How do you know that?

A. It's the amplifier that Officer -- I'm sorry, Mr. Perry was carrying and I later took custody of it and entered it into evidence at our department. And this label right here is what I filled out to identify it as such.

Q. Okay. And so -- just so I'm clear, what happened after you saw the defendant walking out carrying two items?

A. I asked him to put them down where he stood and to speak with me.

Q. And what did he say when you asked him to speak with you?

A. He put the amplifiers down and he came over and spoke with me.

Q. Okay. And you said he was carrying two.

A. Correct.

Q. Okay. I'm sorry.

[70] MS. LA FRANCE: May I approach again, Your Honor?

THE COURT: Yep.

BY MS. LA FRANCE:

Q. I'm showing you what's been marked for identification as State's 3, do you recognize this item?

A. Yes, I do.

Q. And how do you recognize it?

A. Again, I recognize it by the evidence label, it's the second amplifier that Mr. Perry was carrying that night.

Q. Okay. And how do you know this is the amplifier that the defendant was carrying that night?

A. It's the same as the one I saw that night and it has the evidence label which I filled out that night after I took it into custody.

Q. Okay.

MS. LA FRANCE: Your Honor, I'd ask that both identifications be struck and these be entered as full exhibits.

MS. KOWALEWSKI: No objections.

THE COURT: All right. Yes, those two may be marked, what is it? 2 and 3 may be marked as full exhibits.

(State's 2 and 3 admitted into evidence.)

MS. LA FRANCE: And Your Honor, may I publish these to the jury?

[71] THE COURT: Sure. You may.

Appendix H

(Exhibits published to jury.)

BY MS. LA FRANCE:

Q. Officer Clay, what happened after you told the defendant to put those two items down?

A. He did so. He came over and spoke with me.

Q. Okay. And what did he say -- or where did he say he got these amplifiers from?

A. Mr. Perry claimed that he had found them in the middle of the parking lot and was moving them to a different location.

Q. And what did he say after he told you found these amplifiers in the middle of the parking lot?

A. He claimed that other individuals had stolen them.

Q. Okay. Was he able to point out anybody?

A. He gave me a brief description of one and then pointed to another one in a different location.

Q. Okay. And what happened after he pointed -- was he actually pointing at somebody?

A. Yes.

Q. Okay. What happened after he pointed out that person?

A. I spoke to this person and determined that he -- this person told me he had not been in the area.

Q. Okay. Just to be clear, how many people did he -- did [72] the defendant say were in the parking lot that night?

A. I believe he said there had been three.

Q. Okay. And what happened after -- what happened after you spoke to that person he pointed out?

A. I was then approached by the owner of a vehicle that had been broken into in the parking lot.

Q. Okay. And just to -- just to clarify, you positive that he said there were three persons?

A. To the best of my recollection, yes.

Q. Okay. Would it help to refresh your memory if you read your report?

MS. KOWALEWSKI: Your Honor, may I -- may we approach?

THE COURT: Sure.

(At sidebar.)

MS. KOWALEWSKI: This is an improper use of refreshes the recollection. She -- her memory hasn't been exhausted. She testified that to the best of her recollection

there were three people. She hasn't indicated any inability to not remember, so I would object at this line of refreshing recollection.

MS. LA FRANCE: I think she just said that she's not sure.

THE COURT: Overruled. You may -- you may.

MS. LA FRANCE: Thank you.

[73] (Sidebar concluded.)

MS. LA FRANCE: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MS. LA FRANCE:

Q. Officer Clay, I'm showing you on your -- you wrote a report about this matter, right?

A. I did.

Q. Okay. And I'm just showing -- if you could just read -- I'm sorry, just the -- where it starts there, to yourself and then look up after you're finished.

A. (Witness reviews exhibit.)

Q. Do you recall how many people he said were running through the parking lot?

A. Mr. Perry told me there were a couple of people running through the parking lot.

Q. Okay. So when he said a couple, would that mean -- what did that mean to you, two or three?

MS. KOWALEWSKI: Objection. Speculation.

THE COURT: Sustained.

MS. LA FRANCE: Okay. I'll move on.

BY MS. LA FRANCE:

Q. After you -- so you spoke to another individual that the defendant had pointed out.

[74] A. Yes.

Q. And what was his name?

A. Rauli Anziani.

Q. What did you do after speaking with Mr. Anziani?

A. I was then approached by the owner of a vehicle that had been broken into.

Q. Okay. And I just want to back up for a minute. What, if anything, did Mr. Anziani have in his possession?

A. Mr. Anziani didn't have anything in his possession of consequence.

Q. Okay. You said after that you spoke to the owner of the vehicle?

A. Yes.

Q. Who was that?

A. Alex Clavijo.

Q. And was he alone?

A. Yes, he was.

Q. Okay. And where did you speak with him initially?

A. Mr. Clavijo came out of the rear entrance of 70 1/2 West Hollis Street to -- directly into the back parking lot and approached me there.

Q. Okay. And what happened when -- what happened when he approached you?

[75] A. Mr. Clavijo told me that --

MS. KOWALEWSKI: Objection. May we approach?

THE COURT: Yes.

(At sidebar.)

MS. KOWALEWSKI: I'm not sure what it's coming in for, but if it's coming in for the truth, it's hearsay. And he already testified.

MS. LA FRANCE: Okay. I'll move on.

THE COURT: All right.

(Sidebar concluded.)

BY MS. LA FRANCE:

Q. Officer Clay, without getting into what exactly Mr. Clavijo said, what action did you take after initially meeting with Mr. Clavijo?

A. Mr. Clavijo and I went into 70 1/2 West Hollis Street so that I could speak with his neighbor.

Q. Okay. And who did you speak with there?

A. Nubia Blandon.

Q. Okay. And what floor did she live on?

A. I believe it was the third floor.

Q. All right. And where did her apartment face?

A. Ms. Blandon's apartment, her -- I believe it's her living room windows -- I never entered the apartment, however she [76] indicated that her windows faced the back parking lot.

Q. Okay. And where were you speaking to her?

A. We were in the hallway. I was still with Mr. Clavijo as well and the three of us stood in the hallway directly outside of her apartment.

Q. Okay. Was she able to speak with you in English?

A. No, she was not.

Q. Okay. So who was doing the translating?

A. Mr. Clavijo was.

Q. Okay. And where -- so at this point you had gone up into the apartment building, where was the defendant while you went up to the -- to Mr. -- with Mr. Clavijo?

A. Mr. Perry was still in the back parking lot with another officer.

Q. Okay. Who was the officer who responded?

A. Officer Robert Dunn.

Q. Okay. And when you were speaking with Ms. Blandon and Mr. Clavijo, what information were you seeking?

A. Mr. Clavijo --

Q. And again, just to remind without saying any -- without telling what he said, what information were you looking for?

A. Mr. Clavijo had been made aware that his car had been broken into and Ms. Blandon had the information as to who had [77] broken into his car.

Q. Okay.

A. And so I was gaining the information that Ms. Blandon had about the subject that had broken into the car.

Q. Okay. So was it fair to say -- what -- were you looking for a description of the person?

A. I was.

Q. Okay. And what happened when you asked her to describe the person?

A. Ms. Blandon did not give me any specific descriptors, but rather told me that the person she had seen breaking into the car was currently standing in the back parking lot with the other officer.

Q. Okay. And who was standing -- at that time who was standing with the officer?

A. That was Mr. Perry.

Q. Okay. And when you asked her to describe the person she saw, what action did she take?

A. She pointed -- Ms. Blandon was standing on the threshold of her apartment and her hallway, so half her

body was in the apartment and she pointed towards her windows as she explained about the person standing in the back parking lot.

Q. Okay.

[78] THE COURT: And I'm sorry, just so I make sure I understand, when you were speaking to Ms. Nubia at this point, was -- were you and she in view of the defendant and Officer Dunn?

THE WITNESS: No.

THE COURT: I mean, could you see Officer Dunn and the defendant from where you were speaking with her?

THE WITNESS: No. Neither one of us could see at that point.

THE COURT: Okay. All right. Go ahead.

BY MS. LA FRANCE:

Q. And just so we're clear, was there anybody else in the parking lot at that time with Officer Dunn?

A. No there was not.

Q. Okay. And at some point did you go back down to the parking lot?

A. Yes, I did.

Q. Okay. Was there -- when you went back down to the parking lot, was there anybody else speaking with Officer Dunn when you went back down to the parking lot?

A. No, there was not.

Q. Okay. And did you speak to anybody else about this incident?

[79] A. Yes, I did.

Q. And who did you speak to?

A. I spoke with Joffre Ullon.

Q. Okay. And who is he?

A. That's Ms. Blandon's husband.

Q. Okay. And just to go back, you had indicated that the two items that have been entered into evidence, State's 2 and 3, you found the defendant holding. Is that correct?

A. Correct.

Q. All right. What other items did you find at the scene or in the general area?

A. When I first saw Mr. Perry with the two amplifiers, I also saw a metal bat against -- it was on the ground near the fence behind him.

Q. Okay.

MS. LA FRANCE: May I approach, Your Honor?

THE COURT: Yes.

BY MS. LA FRANCE:

Q. I'm showing you what has been entered as State's -- I mean, I'm sorry, marked for identification as State's 1. Do you recognize that item?

A. Yes, I do.

Q. And what item is that?

[80] A. This is an Easton baseball bat.

Q. Okay. And where is this item from?

A. This item I recovered from the ground in the back parking lot near the fence.

Q. Okay. Was that the item that you said you saw as you approached the defendant?

A. Yes, it is.

Q. Okay. How do you know this is the same item?

A. It's the same item that I saw and I also recognize it by the evidence tag that I filled out so I may enter it into evidence at the department.

MS. LA FRANCE: Your Honor, I'd ask that the identification be struck and the exhibit entered as a full exhibit.

MS. KOWALEWSKI: No objection.

THE COURT: All right. It may be marked, that's one, I believe, yes.

(State's 1 admitted into evidence.)

BY MS. LA FRANCE:

Q. And Officer Clay, did you find any other items in the general area of where you saw the defendant?

A. Yes, I did.

Q. What other items did you see?

[81] A. I found a large box covered with a gray material containing two Punch speakers.

MS. LA FRANCE: Okay. And if I could have the witness come down, Your Honor?

THE COURT: Sure. Yeah.

BY MS. LA FRANCE:

Q. And Officer Clay, I'm going to show you what's been marked for identification as State's 5. Do you recognize this item?

A. Yes, I do.

Q. What is this item?

A. This is the large box covered with the gray material and on this side there are two Punch speakers in the box.

Q. Okay. And where did you see this?

A. This was located at the end of the property lot after the parked cars, at the corner of a fence near the exit to Ash Street.

Q. Okay. So about how far was this from where you found the defendant?

A. This was probably a couple car lengths, parked car lengths away.

Q. Okay. And how do you know this is the item that you saw that night?

[82] A. I recognize it and I also recognize the evidence label that I filled out upon taking it into custody and entering it as evidence.

MS. LA FRANCE: Your Honor, I'd ask that the identification by struck and the exhibit entered into as a full exhibit.

MS. KOWALEWSKI: No objection.

THE COURT: Okay. 5 may become a full exhibit.

(State's 5 admitted into evidence.)

MS. LA FRANCE: Your Honor, I will not be publishing this to the jury.

THE COURT: Thank goodness.

BY MS. LA FRANCE:

Q. Okay. Did you see anything else in the area when you confronted the defendant?

A. There was a maroon bicycle in the parking lot.

Q. Okay. And did the defendant -- did you find out who owned this motor -- I'm sorry, bicycle?

A. I did not.

Q. Okay. And did the -- so the defendant never said it was his or not?

A. Nope.

Q. Okay. Where was the bicycle located with respect to the [83] rest of the items?

A. It was next to the box with the speakers in it.

Q. Okay. And when you went back down to the parking lot, who went with you?

A. Mr. Clavijo did.

Q. Okay. And where did you go once you got back down to the parking lot?

A. Once in the parking lot, Mr. Clavijo and I looked at his vehicle to see what, if any, damage had been done to it.

Q. Okay. And at some point, were you able to show him the items you had found?

A. Yes.

Q. Okay. And how many items was he able to identify?

A. At that particular point, I only showed him three of the items, the two amplifiers and the bat and he was able to identify all of them.

Q. Okay. And at some point, did you identify -- did you show him the big gray box that you found with the speakers?

A. Yes. And he was able to identify that as his as well.

Q. Okay. And before you showed him the items what, if any, description, without saying exactly how he described it. Did he give -- was he able to describe what the items should have been?

A. Yes, he was.

[84] Q. Okay. And how close was his description of the items to the actual items that you eventually showed to him?

A. The description he gave me were all accurate for the three items that I showed him.

Q. Okay. And just to be clear, his description of the items was prior to him actually seeing the items that you recovered.

A. Correct.

Q. Okay.

MS. LA FRANCE: And, Your Honor, I would ask and I'm not sure, this may come in as full -- Your Honor, I guess at this point, we would ask that these be marked for identification only.

THE COURT: Okay.

MS. LA FRANCE: State's 6, 7, 8, 9, 10.

THE COURT: Yes, let them be marked for identification.

(State's 6 through 10 marked for identification.)

BY MS. LA FRANCE:

Q. Okay. I'm showing you what has been marked for identification as the State's 6. Do you recognize that?

A. Yes, I do.

Q. What is that?

A. This is a picture of the baseball bat that's been entered into evidence as it lay on the ground where I found it.

[85] Q. Okay. And just to be clear, there were a number of photos taken at the scene. Is that correct?

A. Yes.

Q. Did you take the photos?

A. I did not.

Q. Who took the photos?

A. Sergeant Randy Dumas.

Q. Okay. But is that a fair and accurate representation of the bat as you found it that night?

A. Yes it is.

MS. LA FRANCE: Your Honor, I'd ask that the identification be struck and the exhibit entered as a full exhibit.

MS. KOWALEWSKI: No objection.

THE COURT: All right. 6 may become a full exhibit.

(State's 6 admitted into evidence.)

BY MS. LA FRANCE:

Q. I'm showing you what has been marked for identification as State's 7. Do you recognize that?

A. Yes, I do.

Q. What is that?

A. This is a picture of the two amplifiers that Mr. Perry had been carrying. And it's a picture of them on the ground as [86] they lay after he put them down.

Q. Okay. And just to be clear it appears the black one is sitting on top of the red one, I think.

A. No, I think it's actually the red one is sitting on top of the black one.

Q. Sorry. Okay. Is that a fair and accurate representation of the amplifiers as they were when Mr. Perry, the defendant, put them down?

A. Yes, it is.

MS. LA FRANCE: Your Honor, again I'd ask the identification be struck and it entered as a full exhibit.

MS. KOWALEWSKI: No objection, sir.

THE COURT: All right. 7 may become a full exhibit.

(State's 7 admitted into evidence.)

BY MS. LA FRANCE:

Q. I'm showing you what has been marked for identification as State's 8. Do you recognize that photo?

A. Yes, I do.

Q. What is that photo of?

A. This is a photograph of the trunk of Mr. Clavijo's vehicle, which had contained the large box with the speakers.

Q. And is that a fair and accurate representation of the trunk as you recall it?

[87] A. Yes, it is.

MS. LA FRANCE: Your Honor, I'd ask that the identification be struck and entered as a full exhibit.

MS. KOWALEWSKI: No objection.

THE COURT: All right. 8 may become a full exhibit.

(State's 8 admitted into evidence.)

BY MS. LA FRANCE:

Q. And I'm showing what has been marked for identification as State's 9. Do you recognize that?

A. Yes, I do.

Q. What is that?

A. This a picture of the glass that was on the interior of Mr. Clavijo's vehicle from a broken window to his vehicle.

Q. And is that a fair and accurate representation of the glass as you saw it that night?

A. Yes, it is.

MS. LA FRANCE: Your Honor, again, I'd ask that the identification be struck and entered as a full exhibit.

MS. KOWALEWSKI: No objection.

THE COURT: All right. 9 may become a full exhibit.

(State's 9 admitted into evidence.)

BY MS. LA FRANCE:

Q. All right. And lastly I'm showing what has been marked [88] for identification as State's 10. Do you recognize that photo?

A. Yes, I do.

Q. What is that?

A. This is a photograph of the broken window to Mr. Clavijo's vehicle.

Q. Okay. And is that a fair an accurate representation of the window as you saw it that night?

A. Yes, it is.

MS. LA FRANCE: Your Honor, again, I would ask that the identification be struck and entered as a full exhibit.

MS. KOWALEWSKI: No objection.

THE COURT: Yes, it may be a full exhibit.

(State's 10 admitted into evidence.)

MS. LA FRANCE: Now with the Court's permission I would like to publish this to the jury.

THE COURT: Yes.

MS. LA FRANCE: All five exhibits.

THE COURT: Yep.

BY MS. LA FRANCE:

Q. At some point that night did you arrest the defendant?

A. Yes, I did.

Q. Okay. And can you tell the jury please what steps you took when you arrested him?

[89] A. I told Mr. Perry he was under arrest, then handcuffed him behind his back, checked the handcuffs to make sure they weren't too tight and then double locked them so that they could not become tighter on him. Then I performed a pat search for officer safety.

Q. Okay. Can you tell the jury please, why do you perform a pat search when you arrest a subject?

A. That's for officer safety. It's always unknown what a subject has on their person. And even though they are handcuffed behind their back they may still have access to items in their waistband, pockets or elsewhere on their body.

Q. And when you pat searched him did you find anything out of the ordinary?

A. Yes, I did.

Q. What did you find?

A. I found a tool in one of his back pockets.

Q. Okay. And can you tell the jury please the process by which you found this tool?

A. I pat searched Mr. Perry on the outside of his clothing, felt the object, then removed it from his back pocket.

Q. Okay. And did the defendant say anything about why he had that?

A. Mr. Perry claimed that is a tool that he uses to fix his [90] bicycle.

Q. Okay. And how many -- I'm sorry, strike that.

What type of tool was it?

A. It was a silver wrench vice pliers, I believe is the term.

Q. Okay. And how many of these did you find on his person?

A. Just one.

Q. Okay.

MS. LA FRANCE: May I approach Your Honor?

THE COURT: Yes.

MS. LA FRANCE: Thank you.

BY MS. LA FRANCE:

Q. I'm showing what has been marked for identification as State's 4. Do you recognize that item?

A. Yes, I do.

Q. Okay. How do you recognize it?

A. This is the tool that I pulled out of Mr. Perry's back pocket. I recognize it just on it's face value and also by the label that I filled out to enter it as evidence at my department.

MS. LA FRANCE: Your Honor, I'd ask that the identification be struck and the exhibit entered as a full exhibit.

MS. KOWALEWSKI: No objection.

[91] THE COURT: Okay. 4 may become a full exhibit.

(State's 4 admitted into evidence.)

BY MS. LA FRANCE:

Q. And prior to you finding this wrench, did you have -- what, if any, information did you have that that wrench might have some significance to Mr. Clavijo?

MS. KOWALEWSKI: Objection. May we approach?

THE COURT: Sure.

(At sidebar.)

MS. KOWALEWSKI: Basis of her knowledge is hearsay.

MS. LA FRANCE: Your Honor, I think -- I'm not going to say what he said, I'm just establishing that he was going to identify it. It's just the basis for --

THE COURT: He's already identified it.

MS. KOWALEWSKI: Right.

THE COURT: How's it relevant? I'll sustain that.

(Sidebar concluded.)

BY MS. LA FRANCE:

Q. That -- the wrench that you found, at some point did you have an occasion to show it to Mr. Clavijo?

A. Yes, I did.

Q. Okay. And what, if any, identification did he make of it?

[92] A. He identified it as belonging to him.

Q. Okay. And again, you took that back to the police station.

A. Correct.

Q. Okay.

MS. LA FRANCE: Your Honor, I'd ask to publish that to the jury.

THE COURT: Sure.

(Exhibit published to jury.)

BY MS. LA FRANCE:

Q. Did you find anything else similar to that on the defendant?

A. No.

Q. When you pat frisked him?

A. No, I did not.

Q. Okay. And what happened after you arrested him/

A. I placed Mr. Perry in my vehicle and I later transported him to the station where he was processed.

Q. Okay.

MS. LA FRANCE: One moment, Your Honor.

(Pause in proceedings.)

BY MS. LA FRANCE:

Q. I just wanted to clarify, when you approach the vehicle, [93] [Clay - Cross] what condition besides the one window that was smashed, what was the condition of the other windows?

A. The right front driver's -- I'm sorry, the right front window on the passenger door was rolled down completely and both doors were unlocked and the trunk was open.

Q. Okay.

MS. LA FRANCE: Thank you. I have no further questions. You may inquire.

CROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. I want to talk a little bit about timing. And when you had contact with different -- different parties. You arrived on scene at about 2:50, 2:53 somewhere around there?

A. Correct.

Q. Okay. And the first thing you saw was a tall black man in the alley way parking area, right?

A. Correct.

Q. And you saw him carrying these two amps?

A. Correct.

Q. And you told him to put down the amps.

A. Yes.

Q. And he did so immediately.

A. Correct.

Q. And at this point, you hadn't made contact with Mr. [94] Clavijo yet, right?

A. Correct.

Q. And he wasn't downstairs in the parking lot at this time, right?

A. Correct.

Q. Okay. Then you talked to -- you spoke to Mr. Perry, right?

A. Yes.

Q. And he'd told you that he'd see a couple of other people in the alley before him.

A. Correct.

Q. And then you spoke -- how long did it take you to have that conversation with Mr. Perry? That initial conversation?

A. Maybe a minute.

Q. Okay. And then you walked over to West Hollis Street with him, right?

A. No, to Ash Street.

Q. I'm sorry, you walked over to Ash Street with him.

A. Yes.

Q. And he pointed out somebody.

A. Yes.

Q. And you went over and you had a conversation with that person.

[95] A. Correct.

Q. How long did it take you to have that conversation with that other person?

A. It took a couple more minutes, maybe.

Q. Okay. Two to three, if that?

A. Probably more, four to five.

Q. Okay. And then you told Mr. Perry to stay put, right?

A. Yes.

Q. And you went back to 70 1/2 West Hollis Street?

A. Well, we were still --

Q. Pretty much --

A. -- in that parking lot.

Q. Okay. And then you went and you spoke with Mr. Clavijo.

A. Correct.

Q. And then you went upstairs --

A. Correct.

Q. -- and spoke with Ms. Blandon Castro.

A. Yes.

Q. And how long would you say that interaction took?

A. Just with Mr. Clavijo and Ms. Blandon, probably about ten minutes.

Q. Okay. At what point did Ms. Blandon's husband arrive?

A. At -- very near the end of my conversation with her.

[96] Q. Would you say that was about 3:15 or 3:20 in the morning?

A. I was not keeping track of time, so --

Q. Okay. But it was towards the end of the fifteen -- ten to fifteen minutes that you spent talking with them.

A. Correct.

Q. Okay. I want to talk a little bit about your initial conversation with Ms. Blandon Castro. She was a native Spanish speaker, right?

A. Yes.

Q. Had a hard time speaking English.

A. Correct.

Q. Okay. And so you had to use an interpreter in order to understand her.

A. Yes.

Q. Okay. You would agree that under ideal circumstances you would use a police officer or an interpreter to interpret --

A. Correct.

Q. -- or interview a witness.

A. Correct.

Q. Okay. And you would agree that that's the best practice because they're neutral, right?

A. Correct.

[97] Q. And they have no interest in what the translation is.

A. Correct.

Q. Okay. And it's important they wouldn't necessarily care if a person was found guilty or not.

A. Correct.

Q. Okay. And in this case you used Mr. Clavijo to translate, right?

A. Yes.

Q. And he's the victim?

A. Correct.

Q. Okay. You've been a police officer now for about two and a half years?

A. Correct.

Q. Okay. And you've dealt with may people that have had things stolen from them, right?

A. Yes.

Q. And is it fair to say that some of them get upset?

A. Yes.

Q. And that some of them really want their stuff back?

A. Yes.

Q. Okay. Is it fair to say you were the first person on the -- I want to talk a little bit -- I'm sorry, I want to talk a little bit about where you found that bat. You were the first on [98] scene.

A. Correct.

Q. Okay. You saw a tall black man and you heard a clang.

A. Correct.

Q. Okay. At some point you found the bat, right?

A. Yes.

Q. And the bat was next to a fence.

A. Yes.

Q. And it actually -- and was on debris, right?

A. Yes.

MS. KOWALEWSKI: May I publish this to the jury, Your Honor?

THE COURT: Sure.

(Exhibit published to jury.)

BY MS. KOWALEWSKI:

Q. You seized that bat, right?

A. Correct.

Q. And brought it to the police department.

A. Yes.

Q. You never fingerprinted though, right?

A. No.

Q. And it was never sent to the lab for an analysis?

A. No.

[99] Q. Okay. At that point, after you heard the clang, you confronted Mr. Perry, right?

A. Yes.

Q. And he told you that he'd seen other people there right before you had arrived?

A. Yes.

Q. And that they had dropped a bat right before -- right when you arrived.

A. Correct.

Q. Okay. And at this point is when other officers arrived on the scene.

A. I did not see them arrive.

Q. Okay.

A. It would make sense though.

Q. Okay. You were wearing your uniform that night, right?

A. Yes.

Q. Can you please describe the Nashua Police Department patrol uniform?

A. It is blue in collar. It has -- we wear our badge on the front of our shirt as well as a name plate. It has the Nashua Police Department patch on both shoulders and we also wear a full duty belt to include our department issued fire arm and other -- our handcuffs and other tools.

[100] Q. Okay. Like a flashlight, things like that?

A. Yes.

Q. Okay. And that is what you were wearing that night?

A. Correct.

Q. And you were in -- you operate a cruiser, right?

A. Correct.

Q. Can you please describe the Nashua Police Department cruisers?

A. The Nashua police cruisers are two toned in color. They also have the Nashua Police Shield on both sides of the vehicle and say Nashua Police in several locations on the vehicle. They also have a light bar on the top of the vehicle and the headlights also strobe when you turn the emergency lights on.

Q. Okay. At what point did Officer Dunn arrive?

A. The first time Officer Dunn and I had contact was after I spoke with Mr. Anziani.

Q. Okay. And at that point, you had Mr. Perry stay with Officer Dunn, right?

A. Correct.

Q. Okay. Officer Dunn, what was he driving that night?

A. He was driving a similar vehicle. The only difference being is he's a K-9 officer, his backseat is equipped for his police dog.

[101] Q. Did he have the canine with him that night?

A. Yes, he did.

Q. Okay. But he didn't use the canine at all in this case, right?

A. No, he did not.

Q. Okay. And Mr. Perry stood with Officer Dunn, right?

A. Yes, he did.

Q. Okay. And was talking with him.

A. Correct.

Q. Okay. And you went on to conduct more investigation.

A. Yes.

Q. Okay. And it's at that point that you talk with Mr. Clavijo, right?

A. Correct.

Q. Okay. Now, it's fair to say that Mr. Clavijo -- that Mr. Clavijo didn't tell you that he had seen people -- or somebody walking with his amps that night?

A. Correct. He did not see that.

Q. Okay. And that he told you that he had not seen or heard anything, right?

A. Correct.

Q. Okay. And did he bring you upstairs to meet with Ms. Castro?

[102] A. Yes, he did.

Q. Okay. You met with her at the threshold of her apartment.

A. Correct.

Q. Okay. And he was translating -- Alex, was translating?

A. Yes.

Q. Okay. You asked her if she could identify the person that she saw.

A. Yes.

Q. And she kind of pointed out the window and said, it's that guy down there.

A. Correct.

Q. Okay. And she was referring to Mr. Perry.

A. Well, she also specified it was the man standing with the officer.

Q. Okay. Okay. Which was Officer Dunn.

A. Correct.

Q. Right next to the cruiser?

A. No.

Q. Where were they standing -- in the middle of the parking lot?

A. No. Our cruisers were all parked on West Hollis Street.

Q. Okay. But it was -- she -- basically -- specifically [103] said the man talking to the officer.

A. Correct.

Q. And then she went and walked over and she pointed, right?

A. She didn't move, she just kind of gestured from where she stood towards her own windows.

Q. Okay. And you would agree that she had not provided with a lot of detailed description about the man that she saw that night?

A. Correct.

Q. Okay. And by detailed, you would agree no facial features were mentioned.

A. Correct.

Q. No facial hair.

A. Correct.

Q. No color -- no eye color description.

A. Correct.

Q. Nothing about scars or tattoos.

A. Correct.

Q. Okay. And it's also fair to say, never said anything about hearing the sound of glass smashing.

A. Correct.

Q. Okay. Or the sound of a bat dropping.

[104] A. Correct.

Q. Okay. You inspected -- I want to talk a little bit about the car. After you had this conversation with Mr. Clavijo and Ms. Blandon Castro, you and Mr. Clavijo went downstairs to inspect his car.

A. Correct.

Q. And it was a Honda, right?

A. Yes.

Q. A Honda Civic?

A. Correct.

Q. Two doors.

A. Two doors.

Q. And the back passenger window above the panel was smashed out.

A. On the driver's side.

Q. On the driver's side, sorry.

A. Correct.

Q. Was smashed out.

A. Correct.

Q. And how big is that window would you say?

A. Maybe about a third the size of a regular window on a Honda Civic.

MS. KOWALEWSKI: May I publish this to the jury?

[105] THE COURT: Yes.

(Exhibit published to jury.)

BY MS. KOWALEWSKI:

Q. But it's not like a -- it was definitely a lot smaller than the window on the driver's door, right?

A. Correct.

Q. And on the passenger door.

A. Correct.

Q. Okay. Now you were the one that was responsible for booking Mr. Perry, right?

A. I transported and stood by him, but I'm not a booking officer.

Q. Okay. Did you stand by while he was booked?

A. Yes, I did.

Q. And so you were able to hear the questions that the booking officer asked Mr. Perry?

A. Correct.

Q. And one of the questions that the booking officer asks is how tall Mr. Perry is.

A. Correct.

Q. And Mr. Perry answered, right?

A. Yes.

Q. And what did he answer?

[106] MS. LA FRANCE: Objection. Hearsay.

THE COURT: Sustained.

BY MS. KOWALEWSKI:

Q. Mr. Perry is taller than you are, right?

A. Yes, he is.

Q. When you were talking to him where did the top of your head come up to?

A. I don't recall. I tend not to get too close to the individuals I speak with.

Q. How tall are you?

A. Five three.

Q. Okay.

MS. KOWALEWSKI: I have no further questions.

THE COURT: All right. Any redirect.

MS. LA FRANCE: No redirect, Your Honor.

THE COURT: Thank you very much, Officer. You may step down.

(Witness excused.)

MS. LA FRANCE: The State calls Nubia Blandon, hopefully.

(Pause in proceedings.)

MS. LA FRANCE: Your Honor, at this point I'd ask the interpreter to be sworn in.

[107] [Blandon – Direct] THE COURT: Sure. Sir, first of all can I ask you to state your name for the record?

THE INTERPRETER: Ricardo Azocar, A-z-o-c-a-r from Words Translating Services

THE COURT: All right. Mr. Azocar, can I ask you to raise your right hand please, sir.

(Interpreter sworn.)

THE COURT: All right. Thank you very much.

MS. LA FRANCE: Thank you, Your Honor.

NUBIA BLANDON, WITNESS FOR THE STATE, SWORN THROUGH INTERPRETER.

MS. LA FRANCE: Thank you. You may be seated with the Court's permission.

THE COURT: Yes. Please have a seat.

DIRECT EXAMINATION BY MS. LA FRANCE:

Q. Could you tell us your name please and spell your last name for the court record?

A. Nubia Blandon, B-l-a-n-d-o-n.

Appendix H

Q. Where do you live?

A. 70 1/2 West Hollis Street.

Q. Are you married?

A. Yes, ma'am.

Q. And to whom?

A. Joffre Ullon.

[108] Q. In August of 2008, where were you living?

A. Same place, 70 1/2 West Hollis Street.

Q. Do you know Alex Clavijo?

A. Yes, ma'am.

Q. Sorry. I understood that, so I responded. How do you -- how do you know Alex?

A. They used to live in the apartment across the hall from ours.

Q. And that's at 70 1/2 West Hollis?

A. Yes.

Q. And I'd like to direct your attention to early morning a little before 3 a.m. on August 15th of 2008. Okay?

A. Yes.

Q. Were you up at that time?

A. Yes.

Q. And why were you -- why were you up?

A. We have to get up at 2:30 in the morning because my husband had to go to New York --

Q. Please continue.

A. -- in order to travel to Equador to visit his parents.

Q. And did you see anything strange when you were up that morning?

A. Yes, miss.

[109] Q. And what did you see when you were up?

A. When I got up I started making some coffee, but my husband was already in a hurry to start his trip for New York so he said he would get the coffee from Dunkin'. So I went to the kitchen and my window allows me to see out to the parking area.

Q. What did you see -- did you see anything out in the parking area?

A. Yes, miss.

Q. What did you see?

A. I saw the young man and a bicycle was in the parking lot and he went around a couple of times looking at the cars and I -- when I sat down to look out because I thought -- to observe this person was looking at the cars.

Q. When you say looking at the cars, what was he doing specifically?

A. He went around twice on the bicycle and he went to the parking lot exit. Then he came back without the bicycle and he parked or he parked himself near Alex's car.

Q. Okay. When you say Alex, whose car was it?

A. Alex's car.

Q. Alex, that I asked you about earlier, Alex Clavijo?

A. Yes.

Q. Your neighbor?

[110] A. Yes.

Q. And what was he doing to Alex's car?

A. My husband's car is in parking spot number six there was another big car, bigger car in spot number five and Alex's car was in spot number four. I thought it was one of their friends, but when I saw that he was opening

the rear section of the car and taking out the music system, I called my husband and I told him what was going on and he told me to call the police. I called, but they did not understand what I was saying and I called my husband again and I asked him to be the one to call because I imagined that was a theft.

Q. Okay. So I want to clarify, did you see how that person got into Alex's car?

A. No, miss.

Q. Could you see his entire car?

A. No, miss.

Q. Okay. Why couldn't you see his entire car?

A. Before Alex's car there was a big car parked there. I could only see the back, the rear part of the car.

Q. And you said that the person was getting the music system.

A. Yes.

Q. Okay. About how big was the system?

[111] A. About this big.

THE INTERPRETER: She signals something about two and a half to three feet.

MS. LA FRANCE: Okay. With the Court's permission, I'd ask her to step down.

THE COURT: Sure.

BY MS. LA FRANCE:

Q. Could you step down please?

A. (Witness complies.)

Q. I'm showing you what has been entered as State's 5. Does this look similar to what you saw the person taking out of his car?

A. Yes.

Q. Okay. Thank you.

(Witness resumes stand.)

Q. You said that you were having trouble, the police were having trouble understanding you when you called.

A. Yes.

Q. And did they finally arrive that night?

A. Yes, miss.

Q. Okay. After you tried to call the police what did you do?

A. I stayed there sitting down waiting for the police to [112] arrive. And I then I rung the bell where Alex lives. I rung the bell several times because he was sound asleep and he opened the door and I said, Alex, somebody's robbing you.

Q. What did Alex do after that?

A. He said, how? And he went down to the parking lot and the police were right there.

Q. Okay. Where were you after Alex went down to the parking lot?

A. Looking out the window.

Q. Okay. So you were still at your window?

A. Yes.

Q. Was it the same kitchen window you had been looking out previously?

A. Yes, miss.

Q. Okay. Is there another window in your apartment that also looks down at the parking lot?

A. No, ma'am.

Q. Okay. So when you first saw the person on the bike riding around, about how long could you see him?

A. I believe it would be as much as a half hour until evolved or happened.

Q. Could you see that person the whole time?

A. Yes, miss.

[113] Q. So just be to be clear you said at one point you had gone to wake Alex up, right?

A. Oh, yes. When my husband had already called the police and I had already seen that the people had arrived at the parking lot. And I felt more confident to call Alex.

Q. Okay. So --

THE COURT: So I -- you know, I'm sorry, can I just make sure I'm understanding that. Am I understanding from what you're saying, is that the police had already arrived at the parking lot by the -- before you went to tell Alex. Is that correct?

THE WITNESS: Correct. Correct.

THE COURT: All right.

BY MS. LA FRANCE:

Q. But just to clarify, you said you called the police first --

A. But they did not understand me.

Q. Okay. But then you had your husband call?

A. Yes.

Q. But I just want to clarify -- was your testimony previously that after the police were called, then you went to wake up Alex?

A. Yes.

[114] Q. Okay. And just to be clear --

A. The police did not take long to get there, thank God.

Q. Okay. And just to be clear, this happened almost a year ago, right?

A. Yes.

Q. Okay. And you were able to review a statement that you gave to the police prior to testifying?

A. Yes.

Q. But your testimony is essentially from your memory of what happened that night?

A. Yes.

Q. Thank you. After the police arrived, did you talk to any police officer?

A. Yes.

Q. Do you remember who you talked to?

A. I remember her entry, but I not recall her name.

Q. Okay. Was she -- and you said a she?

A. Yes. It was a female officer.

Q. Okay. Was she young or old?

A. Young.

Q. Okay. And was she black, meaning African American, or white?

A. White.

[115] Q. All right. And what did she ask you about what you saw that night?

A. She asked me what happened, how -- several questions concerning what I had seen in those moments.

Q. Okay. And were you able to describe for her the person you had seen on the bike and carrying something out of Alex's car?

A. Yes.

Q. Okay. How did you -- were you able to identify him at all?

A. Yes. I was able to identify the person as to the physical description, but not his clothing.

Q. Okay. And just so I'm clear, when you were talking to the police officer, the female police officer, where were you?

A. In my apartment, in the door.

Q. Were you able to point out the person you saw riding around and taking the item out of Alex's car?

A. Not point, as I said thank God the officer arrived in time and found out who the person was.

Q. I'm sorry, could you say -- could you repeat that?

A. Yes, thank God the officer arrived in time to where the person was.

Q. Okay. So you said the officer arrived to where the [116] person was.

A. Yes.

Q. Okay. The person that you saw, where was he when the officers arrived?

A. In the back as you were leaving the parking lot, when the officer arrived and she drove around looking and that's where she saw him.

THE INTERPRETER: I'm not sure if she drove around or walked around. Would you like me to clarify that?

MS. LA FRANCE: Yes, that would be great.

THE INTERPRETER: Walking.

BY MS. LA FRANCE:

Q. Okay. So just I'm clear so everybody understands, when you called the police, you went back to your window, were you looking out to see everything as it was happening?

A. Yes.

Q. Okay. So the officer that arrived, was she the same officer that ended up coming up to speak to you?

A. Yes.

Q. Okay. And just so I understand your testimony so we're all clear, when she arrived, she met the person who had been riding around on his bike and who had taken the item out of Alex's trunk?

[117] A. Yes.

Q. Okay. And when she came up to talk to you at your apartment, where was the person that you saw riding around on his bike?

A. I don't know whether he was arrested or -- because from the look out the window I couldn't see her as she came back with Alex. I knew they were coming up and I waited for her to arrive and tell me whether she needed to ask me anything.

Q. Okay. Was there another officer there besides the female officer?

A. I didn't see them.

Q. Okay. Do you remember seeing the person who was riding around on the bike who had taken the item out of Alex's car after you spoke -- after you began speaking with Officer -- the young female officer?

A. No.

Q. You don't remember seeing him?

A. No.

Q. Okay. If I gave you a police report describing what you told the officer, would it help to refresh your memory if you saw it?

A. Yes.

MS. KOWALEWSKI: Your Honor, may I approach?

[118] THE COURT: Yes.

(At sidebar.)

MS. KOWALEWSKI: I'm going to object on foundation grounds. It's a police report, it's not a handwritten statement or anything like that. I'm going to ask that Attorney LaFrance lay the proper foundation.

THE COURT: She's asked her if it would refresh her recollection. It seems to me anything could -- you know, this cup could refresh your recollection. So your objection is overruled.

MS. KOWALEWSKI: Thank you.

(Sidebar concluded.)

MS. LA FRANCE: Thank you. May I approach, Your Honor?

THE COURT: Yes.

MS. LA FRANCE: And I guess you have to translate this. Yeah, it's not in Spanish. She could just read it -- I don't know if she reads English or not.

(Interpreter translates police report to witness.)

BY MS. LA FRANCE:

Q. Does that refresh your memory as to whether you saw that individual talking with another officer?

A. With the young lady policeman.

Q. Okay. Who did you see the person with?

[119] A. The person we are referring, to the bicycle person with the police officer, female.

Q. Okay. And so just to be clear, I want to make sure we're absolutely clear on this, I apologize. The person you saw take the item out of Alex's trunk was the same person you saw the young female officer talking to.

A. Yes.

Q. Okay. And was that person white, Caucasian, or African American?

THE INTERPRETER: Well, she's using a word that's specifically a Spanish word for her that specifically designates and African origin person.

MS. LA FRANCE: Okay. Thank you. I have no further questions. This attorney may want to ask you some questions.

MS. KOWALEWSKI: Your Honor, may I approach, briefly?

THE COURT: Sure.

MS. KOWALEWSKI: I need to use the restroom.

THE COURT: Okay. We'll take our second recess now for about ten minutes or so. Please don't discuss the case during the recess. Okay. Thank you.

(Recess taken at 12:49 p.m)

(Proceedings resume at 1:01 p.m.)

(Jury present in court.)

[120] [Blandon Cross] THE COURT: Ms. Kowalewski.

MS. KOWALEWSKI: Thank you, Your Honor.

CROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. I talk really fast, so if you have any questions, stop me. Okay? I want to talk to you a little bit about when you saw the man from your window. Okay.

A. Okay.

Q. You saw him initially at 2:30?

A. Yes.

Q. Okay. And you were in your apartment at the time?

A. Yes.

Q. And your apartment is on the second floor?

A. Fourth floor.

Q. Fourth floor. I'm sorry, fourth floor. But it's fair to say you couldn't see everything that was happening, right?

A. The -- I could, it's quite a distance, but the view was perfect.

Q. Okay. But on direct you talked about a van blocking part of your view, right?

A. My ability to see the front part of the car was not perfect, but my ability to see the rear of the car was.

Q. You went to the police station to talk to a detective about this, right?

[121] A. They sent us a letter asking us to come to the police station, my husband and I, to make a statement concerning the facts.

Q. And you did that?

A. Yes.

Q. Okay. And you told -- and you met with a police officer.

A. Yes.

Q. And she recorded your statement, right?

A. I imagine so.

Q. Okay. And you told that officer that there was a big van blocking your vision.

A. They asked me if I had seen the person breaking the glass and I said no, because that particular section was blocked.

Q. Okay. Thank you. You didn't hear windows being smashed either?

A. No.

Q. Okay. Okay. What time did your husband leave that morning to get coffee for you?

A. He had to leave for New York about 3 a.m., I say approximately 2:30 because before going to pick up his mother, he went for the coffee.

Q. Okay. What time did he come back from getting the [122] coffee?

A. I could not tell you the exact time.

Q. It was after you spoke to the young female officer, right?

A. If I clarify this, my husband got up and I went to the kitchen to make coffee. And he said we were running

late and he was going to go pick up some coffee at Dunkin' Donuts. He got dressed and he went out.

Q. Okay.

A. And when he got dressed and went out --

THE INTERPRETER: I have to get back to the sequence a little bit.

A. I called and told him that the police did not understand what I was saying, to please make the call, because I was noticing the attitude of the young man.

Q. Did your husband come back after you spoke with the police officer?

A. No, he went to New York.

Q. So he went -- he didn't come back at all, he went straight to New York after getting coffee?

A. Yes.

Q. He brought you back your coffee after you spoke the young female officer?

[123] A. Sorry, sorry.

Q. Okay. I just want to make sure everybody understands what your answer is.

THE INTERPRETER: Let me go back to where to where the question that you asked about --

BY MS. KOWALEWSKI:

Q. Okay. So your husband brought back the coffee after you spoke with the female police officer and before he went to New York?

A. He went to get the coffee, that's when I called and told him what I had seen. So I had already made that call.

Q. I'm sorry, when did he come back?

A. Within minutes.

Q. When was it before you talked to the police officer?

A. I have not spoken with the police officer, they did not understand me.

Q. Okay. So when Alex is translating for you, you were talking to a police officer, right? Mr. Clavijo, the owner of the car. When Alex was translating for you, you were talking to the police officer?

A. Yes.

THE COURT: Can I ask you ma'am, when you first -- when you first saw the person riding around the parking lot on the [124] bicycle, was that before or after your husband went to get the coffee?

THE WITNESS: At the point of his leaving the house, I had already told him that I had observed the fellow riding around.

THE COURT: Okay. And you said that when you -- so you had seen the person in the parking lot before your husband went to get the coffee?

THE WITNESS: Yes.

THE COURT: And if I understood your testimony before, when you told your husband what you had seen, he told you to call the police. And here's my next question, did he stay -- did he wait at home while you called the police or did he go to get the coffee while you were calling the police?

THE WITNESS: At the moment right then when he went to get the coffee. And when he came back -- he came back and asked me what I had done and I said I called the police, but they had not understood me.

THE COURT: Okay. So if I'm understanding correctly, the sequence is while your husband goes to get the coffee, you call the police but they can't understand you. Is that correct?

THE WITNESS: Yes.

THE COURT: So then your husband comes back.

[125] THE WITNESS: Yes.

THE COURT: And could you give us an idea of how long your husband was gone?

THE WITNESS: Fifteen minutes.

THE COURT: Okay. And during that fifteen-minute interval, did you still see this person out in the parking lot on the bicycle?

THE WITNESS: Not on the bicycle, but walking.

THE COURT: But walking, okay. So now when your husband gets back, did -- and you told him that the police didn't understand you, did you or he call the police again?

THE WITNESS: He just dropped the coffee off because his parents were waiting in Wayne, but we had communication, my husband and I, and that's what I said to him, that I had called but they don't understand me.

THE COURT: And did he do that? Did he then call -- did your husband then call the police?

THE WITNESS: Yes.

THE COURT: Okay. And then sometime -- is it correct, that sometime after your husband called the police is when you first saw the female police officer out in the parking lot?

THE WITNESS: Yes, it was very quickly.

THE COURT: Okay. Can you give us some idea from the [126] time when your husband called the police -- from that point until when the police arrived, how long was it? Can you give us some idea?

THE WITNESS: Fifteen minutes.

THE COURT: So another fifteen minutes.

THE WITNESS: Yes, very quick.

THE COURT: All right.

BY MS. KOWALEWSKI:

Q. Now when you spoke with Attorney LaFrance before you had said that you thought that the man that you saw was one of Alex's friends.

A. Yes.

Q. Is that because -- and that's because it's not unusual for Alex's friends to look into his car in the morning, right?

A. He has many friends.

Q. It wasn't unusual though, right?

A. About what?

Q. It wasn't that unusual for Alex's friends to come around and look in his car.

A. It was the time, because it was 2:30 in the morning that I was surprised to see someone walking around and observing the car.

Q. I want to talk to you a little bit about what you [127] remember the person looking like. You told the police you saw a black male with a bicycle, right?

A. Yes.

Q. Okay. But you didn't remember the color of the bicycle, right?

A. No.

Q. Okay. And you didn't remember the color of the bike at the time that you spoke to the police?

A. No.

Q. Okay. And you couldn't remember what he was wearing.

A. No. I was so scared I really didn't pay attention.

Q. Okay. You also couldn't describe his facial features. For instance, you didn't pay attention enough to describe what color his eyes were?

A. No.

Q. Okay. And you didn't pay attention enough to know if he had any scars?

A. No.

Q. And you didn't pay attention enough to know if he had any piercings?

A. No.

Q. Or if he was missing teeth?

A. No.

[128] Q. Or if he had braces or gold plating on his teeth?

A. No.

Q. And in fact, you told the police this also, right?

A. She did not ask those kind of question.

Q. Okay. But they did show you a bunch of pictures, right?

A. Yes.

Q. And they asked you to pick out the person that you saw in the parking lot that night, right?

A. Yes.

Q. Okay. And they told you that there was no pressure to pick someone out, right?

A. I could not have picked because at that point, I did not clearly perceive the details of his face.

Q. Okay. So you weren't able to pick -- to look at a picture and say that's the guy?

A. No.

Q. Okay. Thank you very much, I have no further questions.

A. Okay.

MS. LA FRANCE: I have no redirect, Your Honor.

THE COURT: All right. Thank you very much, ma'am. You may step down.

THE WITNESS: Thank you very much.

THE COURT: Thank you, ma'am. Thank you.

[129] [Ullon - Direct] (Witness excused.)

MS. LA FRANCE: The State calls Joffre Ullon.

(Pause in proceedings.)

Appendix H

JOFFRE ULLON, WITNESS FOR THE STATE, SWORN THROUGH INTERPRETER.

MS. LA FRANCE: You may be seated.

DIRECT EXAMINATION BY MS. LA FRANCE:

Q. Could you tell us your name please and spell your last name for the court reporter?

A. Joffre Ullon, U-l-l-o-n.

Q. And where do you live?

A. Nashua, New Hampshire.

Q. And are you married?

A. Yes.

Q. I just want to clarify, Joffre, you speak a little bit of English?

A. Yes, I speak a little bit of English. I understand it much.

Q. Okay. Would it be better if we went through the interpreter just to make sure we're -- you're understanding me and I'm understanding you?

A. (No verbal response.)

Q. Okay. So we'll wait for the interpreter to interpret. Okay?

[130] A. Okay.

Q. Even though you may understand what I'm saying. And I'll do the same because I understand little Spanish. Okay. Thank you. I want to talk about August 2008. Okay. On August 15th of 2008, at approximately -- a little bit before 3 a.m., were you up at that time?

A. (No verbal response.)

Q. Okay. And you're going to have to answer so the record can make a record. Okay. No nodding your head. And was -- why were you up that early?

A. I was traveling to New York with my father and my mother to Ecuador.

Q. Was -- I'm sorry?

A. I got up at 2:15 a.m. took a shower, I brush my teeth and my wife -- I was kind of circulating -- I don't know where you want this to start.

Q. All right. Let's back up, okay. Who is your wife?

A. Nubia Blandon Castro.

Q. Was she up also?

A. She got up before I did.

Q. Okay. And did you end up leaving the apartment?

THE INTERPRETER: I'm going to repeat your question, whether he eventually left the apartment, right?

[131] MS. LA FRANCE: Right.

THE WITNESS: Outside?

BY MS. LA FRANCE:

Q. Yes. At some point early that morning did you go to get something at a store?

A. I went out to get coffee for my wife and to pick up an uncle of mine who was going to accompany me.

Q. Okay. When you went outside, did you see anything strange in the parking lot?

A. I saw a person walking around the cars. I started my car and I was about to exit and there was a bicycle lying on the ground and there was a person standing there.

Q. Okay.

A. When that person saw me and turned around so I would not be see him. I got in my car, I drove back to make a second pass to see who that -- to see this person

there, but he hid behind the cars, but I went on. And the bicycle was left there on the ground.

Q. When you saw him, what was he doing?

A. He -- when I saw him he stood still, but he was trying to look into the cars.

Q. And did -- so eventually you left to get coffee. Is that right?

[132] A. Yes.

Q. Did you come back to your apartment?

A. At that moment I called my wife and she said to me that that person is --

MS. KOWALEWSKI: Your Honor, may we approach?

THE COURT: Hang on, hang on. Come on up.

THE INTERPRETER: Shall I complete the answer?

THE COURT: No. Hang on.

(At sidebar.)

MS. KOWALEWSKI: We're getting into a whole bunch of hearsay here. Ms. Blandon Castro testified already.

THE COURT: All right.

MS. LA FRANCE: Okay. That's -- I'll move on Your Honor.

THE COURT: Okay. All right.

(Sidebar concluded.)

BY MS. LA FRANCE:

Q. Okay. Joffre, without getting into what Nubia said to you, what action did you take after you saw this person in the parking lot?

A. I went to get the coffee and that's when I called my wife for her to call the police.

Q. Okay. Was she able to speak to the police?

[133] MS. KOWALEWSKI: Objection.

THE COURT: No, sustained. That's --

MS. LA FRANCE: Okay. I'm sorry. Okay.

BY MS. LA FRANCE:

Q. All right. At some point, did you have to call the police yourself?

A. She cannot speak English and they could not understand her.

Q. Okay. So you called yourself?

A. Yes, I myself called.

Q. And at some point did you return to your apartment?

A. I came in to drop off the coffee and pick up my son.

Q. Okay. And did you see the person you saw looking into the cars when you came back with the coffee?

A. Yes. The person was there with the police.

Q. Okay. And who -- you said he was there with the police. Who was he there with?

A. The police.

Q. All right. Was the police officer a male or a female?

A. A woman.

Q. Was she a young woman?

A. Yes.

Q. Okay.

[134] A. Blonde hair.

Q. Okay. And at some point, you went to the police station about a month later to give a statement. Do you remember that?

A. Yes.

Q. Okay. And during that statement, were you shown a series of pictures of individuals called a lineup?

A. Yes.

Q. Okay. And did you pick out a person you recognized as the person you saw looking in the cars early that morning on August 15th?

A. I recognized the person from the photograph, but because it was night time the -- it was not entirely clear.

Q. Okay. But you did -- you were able to pick out a person out of the -- out of the photo lineup?

A. Yes.

Q. Okay.

MS. LA FRANCE: Your Honor, I asked that this be marked as State's 11 for identification.

THE COURT: Yes, it may be marked.

(State's 11 marked for identification.)

BY MS. LA FRANCE:

Q. Joffre, I'm showing you what's been marked for identification as State's 11. Is that your handwriting?

[135] [Ullon - Cross] A. Yes.

Q. I'm sorry. Is the person you circled, is that the person you saw that night looking into the cars?

A. Yes.

Q. Thank you.

MS. LA FRANCE: Thank you, Joffre, I have no further questions. The defense attorney may have some questions.

CROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. You woke up at 2:15 that morning, right?

A. Yes.

Q. Okay. And you looked out your window, right?

A. I looked out the window and went to the bathroom.

Q. Okay. You didn't -- when you looked out the window, you did not see anything unusual, right?

A. Not yet.

Q. Okay.

A. But when I went down, yes, I saw him downstairs.

Q. Okay. And you went down and you saw a man, right?

A. Yes.

Q. And you thought it was strange, right? Because he was looking in cars.

A. Yes.

Q. And you had your cell phone that night also, right?

[136] A. Yes.

Q. And you had the cell phone at the exact time when you were in the parking lot and saw the guy, right?

A. Yes.

Q. But you didn't call 911 at that time, did you?

A. No.

Q. Okay. And then you got into your car and back out, right?

A. At that time?

Q. You pulled out of the spot, right?

A. I came out and I went out of the side street and then I went to Hollis Street to come into the parking lot again.

Q. Okay. And the guy was still there, right?

A. Yes. When he saw my car headlights he hid himself.

Q. Okay. But you didn't call 911 then?

A. No.

Q. Okay. And during each time that you saw him, you did not see him holding a bat.

A. Not from upstairs. When I came down I could see he's looking through the car windows. When he saw me, he hid.

Q. Okay. You were at the police station in September, right?

A. Yes.

[137] Q. They showed you these pictures, right?

A. Yes.

Q. And you picked someone out, right?

A. Another person?

Q. No, you picked -- you picked a person out of this lineup, right?

A. A person.

Q. You circled it and you initialed it, right?

A. Yes.

Q. But like you said when Attorney LaFrance was questioning you, it was -- because it was night, you weren't entirely clear.

A. The features could not be seen in detail because his of the black race.

Q. Okay. Thank you.

A. I recognized his face and that's why I recognize him from the -- from the photo.

Q. Okay. But you had said it wasn't entirely clear. Is that correct?

A. It was three o'clock in the morning.

Q. Okay. Thank you. And at three o'clock in the morning it's dark out, right?

A. Not entirely because there's lights.

Q. But it was three o'clock in the morning and it wasn't [138] clear, right?

A. There were lights inside.

Q. You testified on direct that you weren't entirely clear because it was dark.

A. And under the trees it would be dark, but he was standing where it was lighted.

Q. So were you lying on direct when you said it wasn't entirely clear because it was dark out?

A. What reason would I have to lie?

MS. KOWALEWSKI: I have no further questions.

THE COURT: All right. Any redirect?

MS. LA FRANCE: No redirect, Your Honor.

THE COURT: Thank you very much, sir, you may step down. Thank you.

(Witness excused.)

MS. LA FRANCE: The State calls Lakeisha Phelps. Your Honor, may we approach, briefly?

THE COURT: Sure.

(At sidebar.)

MS. KOWALEWSKI: May both witnesses and the interpreter be released, Your Honor?

MS. LA FRANCE: No objection.

THE COURT: Yes, they may. Thank you very much. Thank [139] you, sir. Ms. Kowalewski? Ms. Kowalewski?

MS. KOWALEWSKI: I just want a scheduling -- I know you have to leave --

THE COURT: No, I know. How long is this witness going to take?

MS. LA FRANCE: The only problem is, there's two taped statements. One is twenty minutes long, one is twenty-five minutes long. She's ready to come back tomorrow, but I can start her today and then --

THE COURT: Why don't we just come back -- why don't we just come back tomorrow?

MS. LA FRANCE: Okay.

(Sidebar concluded.)

THE COURT: Ladies and gentlemen, there's another witness who is ready to go, but this -- there's a statement that's going to take some time, so rather than kind of start it and then have to interrupt, I think it makes more sense to just recess now.

We'll recess for the day now and I'll ask you to return tomorrow morning at nine o'clock. We can start a little earlier tomorrow morning because I don't have any other lists in the morning.

So we'll start at nine o'clock. I ask you please don't [140] discuss the case with anyone over the evening or among yourselves. It's possible, I don't know what newspapers do or don't do, so to speak, it's possible there could be some publicity given to this case. There could be some story about it in the media or some broadcast either on radio or television, I'm going to ask you please don't -- if there is something like that, please don't read anything about it or listen to any radio or TV broadcast that kind of thing.

Please don't go on the internet, don't try to do any of your own sort of research, look up the names or locations or anything like that. It's really important and fundamental fairness to both sides, requires that the only information that you get about this case and upon which you use to decide the case, be the information that comes to you here in the courtroom where both sides are aware of it. Okay.

So have a nice evening and we'll see you tomorrow morning. Thank you.

(Jury excused until 6/17/09 at 9 a.m.)

MS. LA FRANCE: Your Honor, may we approach once the jury leaves?

THE COURT: Sure.

MS. LA FRANCE: I just wanted the Court to know, I'm not sure what my schedule is tomorrow. I may

have something on [141] at nine, but obviously I'll try to see if somebody can cover, but there are just some things that I can't have covered, but if I can't get them -- I'm assuming the Judge would be willing to continue it. I just I can never remember what my schedule is day to day and there might be something involving witnesses and victims or something, but I'll make every effort to clear my schedule. But I just want the Court to be aware.

THE COURT: All right. That's fine. That's fine. I'll see you, hopefully, at nine.

MS. LA FRANCE: Yeah, hopefully.

THE COURT: Or as quickly thereafter as possible. Thank you. Should I understand we probably will finish tomorrow?

MS. LA FRANCE: Yes.

THE COURT: We will, right. Okay. Good, so I'll have jury instruction and stuff. Very good. Thank you very much.

(Proceedings adjourned to 6/17/09.)

(Concluded at 1:43 p.m.)

* * * *

APPENDIX I — TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROBERT J. LYNN, SUPERIOR COURT JUSTICE AND A JURY, VOLUME 2 OF 2, DATED JUNE 17, 2009

[142] STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT - SOUTH

Supreme Court No. 2009-0590

Nashua, New Hampshire
Wednesday, June 17, 2009
Volume 2 of 2, Pages 142-292

Case No. 08-S-1979 08-S-1798

STATE OF NEW HAMPSHIRE,

Complainant,

vs.

BARION PERRY,

Defendant.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ROBERT J. LYNN
SUPERIOR COURT JUSTICE AND A JURY

* * *

[144] (Proceedings commence at 9:45 a.m.)

(Jury not present in court.)

THE COURT: Good morning. You wanted to see me?

MS. LA FRANCE: Yes, Your Honor. May I approach?

THE COURT: Sure.

MS. LA FRANCE: Or I guess both of us can approach and just argue it at the bench.

As I was preparing last night at home, I realized that the DVD of both his statements -- he had two statements -- it's kind of littered with references to his past and the three strikes law, so I realized that I can't enter the DVDs into evidence because I didn't have -- I didn't have notice that he was going to -- you know, I didn't know he was going to stipulate until yesterday morning, so that requires technical skills beyond my abilities.

What I did was I went through the transcript and I redacted anything basically that refers to his past or his strikes, anything of that nature that -- where the jury can infer that he has a criminal past.

MS. KOWALEWSKI: I've seen the redactions. I have no problems with the redactions that Attorney LaFrance made.

MS. LA FRANCE: And I guess my request would be that -- because, you know, I did state in my opening

they'd see his [145]statement because I just, you know, with everything that was going on last minute, I just didn't remember that the transcript was littered with references and if you see, it is kind of scattered throughout.

I would ask the Court just to instruct the jury that, you know, I don't think there's going to be an objection to putting that into evidence as a full exhibit. My intention is just to briefly go through with Detective Phelps what transpired during the -- you know, during the two interviews briefly, you know, kind of summarizing but not going through verbatim and then letting the jury at their leisure, when they're -- during deliberations deliberating and it becomes a full exhibit.

MS. KOWALEWSKI: I --

THE COURT: Hang on. Hang on. Hang on.

MS. KOWALEWSKI: Okay. I'm sorry.

THE COURT: You're confusing me. So what -- you're not going to put the tapes in at all?

MS. LA FRANCE: No, I can't because they're not redacted.

THE COURT: So how are you planning to have this -- how are you planning to have this transcript then --

MS. LA FRANCE: Through Detective Phelps I'll enter into evidence --

[146] THE COURT: And what are you going to do? You're going to have like you read the questions and he will read the answers of the --

MS. LA FRANCE: Well, no. I mean, that's what I was going to say, I would have Detective Phelps summarize her conversation with him, not verbatim from the transcript, but just in general as she summarizes in her report, because she did do a police report.

Instead of, you know, just to save the Court some time, I have made fourteen copies or I guess we'd need twelve copies for the deliberating jury of the same redacted transcript that they can -- I guess we can enter in as a full exhibit and then they can, you know, read during their deliberations instead of going through word for word during the trial, but with the understanding that it can be full, you know, considered full evidence. They can look at it. You know, we do it all the time, entering the transcript.

MS. KOWALEWSKI: I have no objection to that, Judge.

THE COURT: Okay.

MS. LA FRANCE: And the only other thing I would ask of the Court is -- because I did mention it in my opening that they would see the video, I would ask for an instruction that says -- I don't know how we want to word it. Due to legal [147] considerations, the State cannot put in the video, but you will be provided with this transcript and whatever instruction you feel is required regarding

the redactions, that they are not to, you know, speculate as to what may be redacted, it's not part of the case.

That's my only instruction because I was kind of prejudiced by the late notice.

THE COURT: All right. No, you are. I agree. You are prejudice and I --

MS. KOWALEWSKI: I have no problem with the instruction at all either.

THE COURT: Okay. All right. I won't say legal, I'll just say, you know, for reasons that they need not -- they should not concern themselves. The actual video will not be played for them, but we do have a transcript. And I'll tell -- I'll say to them that there are things in there that, you know, have been crossed out and they shouldn't speculate as to what those things are about. Is that fair?

MS. LA FRANCE: Okay.

MS. KOWALEWSKI: Thank you.

MS. LA FRANCE: Okay. Thank you.

THE COURT: All right. Okay. I ask that we bring in the jury.

[148] (Jury present in court at 9:52 a.m.)

THE COURT: Good morning, ladies and gentlemen. As you see, we can have -- we have sort of a change of

venue, so to speak, into this courtroom. Technology is a great thing, except when it doesn't work. The recording system in the other courtroom somehow, you know, something happened to it, it wasn't working properly, so we had to move here.

Ladies and gentlemen, you may recall that I believe during the State's opening statement Ms. LaFrance made reference to a video recording that you would have an opportunity or maybe one or more video recordings that you would have an opportunity to see. Unfortunately, for reasons that are not -- having nothing to do with the merits of the issues that you have to decide, those recordings are not going to be available for you to review. What the State does have and will be introducing in evidence is a transcript, a written transcript of the interviews in question that were recorded, and you will have that with you during your deliberations.

There will be some testimony, as I understand it, from the next witness about that, and you will have those with you during your deliberations.

The only other thing I would say, ladies and gentlemen, is you're going to see when you get the transcripts that there [149] [Phelps – Direct] are some areas that have been blacked out and I instruct you that that has been done because both sides of the case have agreed that the information that is contained there, the parts that have been blacked out, so to speak, is not something that is relevant to your consideration of the merits of the matters that you have to decide. All right?

Ms. LaFrance?

MS. LA FRANCE: The state calls Lakeisha Phelps.

OFFICER LAKEISHA PHELPS, WITNESS FOR THE STATE, SWORN.

MS. LA FRANCE: With the Court's permission –

THE COURT: Yes. Piease be seated, ma'am.

DIRECT EXAMINATION BY MS. LA FRANCE:

Q. Tell us your name, please, and spell your first and last name for the court reporter?

A. Lakeisha Phelps. The first name is L-a-k-e-i-s-h-a and the last name is Phelps, P-h-e-l-p-s.

Q. And what is your occupation?

A. I am a police officer with the Nashua police department.

Q. And how long have you been a police officer?

A. Twelve years.

Q. And have you been with Nashua the entire time?

A. Yes.

Q. And are you a certified full-time police officer?

[150] A. Yes.

Q. Okay. You went to the police academy?

A. Yes.

Q. Okay. And which police academy did you graduate from?

A. The 112th.

Q. And that was twelve years ago?

A. Yes.

Q. Okay. And what is your current position with the Nashua police department?

A. I'm assigned to the criminal investigation bureau.

Q. And just briefly, what are your duties in the criminal investigations bureau?

A. To investigate all felony offenses.

Q. Okay. Is that for adults and children or just adults?

A. Just adults.

Q. Okay. And I'd like to direct your attention now back to August 15th of 2008. What was your position at that time?

A. I was assigned to the criminal investigation bureau.

Q. Okay. So the same division?

A. Yes.

Q. And at that time were you investigating a case involving Barion Perry?

A. Yes.

[151] Q. Okay. And do you see Barion Perry in the courtroom today?

A. Yes, he's seated at the defense table in a button-up white shirt.

MS. LA FRANCE: Your Honor, I'd ask the record to reflect that the witness has identified the defendant.

THE COURT: Yes, it may.

MS. LA FRANCE: Thank you, Your Honor.

BY MS. LA FRANCE:

Q. When did you become involved in the investigation?

A. The morning following his arrest.

Q. Okay. And your understanding was he was arrested kind of early in the morning on August 15th?

A. Yes.

Q. And who did you speak with first regarding this investigation?

A. I believe it was the shift supervisor for that -- for the third shift so Sergeant Dumas.

Q. Did you ever speak with Officer Nicole Clay on that morning?

A. Yes.

Q. Okay. And did she -- without getting into what she told you, did she give you a briefing about what had happened?

[152] A. Yes.

Q. Okay. So you understood kind of what was going on?

A. Yes.

Q. Okay. And then did you end up speaking with the defendant?

A. Yes.

Q. And prior to speaking with him -- and did you review anything with him?

A. Yes, I reviewed his *Miranda* rights with him.

MS. LA FRANCE: Okay. Your Honor, may I approach?

THE COURT: Yes.

MS. LA FRANCE: And I would ask to have this marked identification and full.

Your Honor, I'd ask that this be marked as State's 12 I think.

MS. KOWALEWSKI: No objection, Judge.

THE COURT: Okay. All right.

(Pause in proceedings.)

BY MS. LA FRANCE:

Q. Okay. I'm showing you what has been marked as State's 12. Do you recognize that?

A. Yes.

Q. What is that?

[153] A. This is our state-issued *Miranda* form -- department issued. I'm sorry.

Q. Okay. And when did you review this *Miranda*?

A. As soon as I brought him up to the interview room.

Q. Okay. And is this the actual *Miranda* review form you went over with the defendant?

A. Yes.

Q. Okay. And could you explain to the jury just briefly why you use this form?

A. So that they understand what their rights are prior to answering any questions when they're in custody.

Q. Okay. And when you reviewed these rights with the defendant, how did you review them?

A. I review -- they're numbered one through five. I read each off. I also place lines next to each number. After I read off each right, I ask the defendant to initial, showing that they understood what I said or if they have any questions, and I do that for numbers one through five.

Q. Okay. And do you recall if he had any questions at this time about his rights?

A. No, he didn't ask any questions.

Q. Okay. And then you once you go through the five enumerated rights, was there another part to that *Miranda* form?

[154] A. There is a waiver portion of the form that I also have the defendant read to me out loud.

Q. Okay. And did he read this out loud to you?

A. Yes.

Q. And did he have any questions about it?

A. No.

Q. And did he agree to speak with you?

A. Yes.

Q. How do you know that?

A. That -- at the end of the form there's a signature where they sign waiving their rights and agreeing to speak.

MS. LA FRANCE: Your Honor, I would ask to publish this to the jury.

THE COURT: Yes, you may.

MS. LA FRANCE: Thank you.

(Exhibit published to jury.)

BY MS. LA FRANCE:

Q. So Detective Phelps, so after you reviewed his *Miranda* rights, what did he say about the incident that had happened the night before?

A. He explained to me what his daily activities were for that day.

Q. Okay. What had he been doing that day? And I'm [155] assuming "that day" means actually August 14th?

A. Yes.

Q. Okay. What had he been doing that day?

A. He told me that he was at home earlier during the day with his family on Amherst Street. He had ridden his bike from Amherst Street to his mother's house on Lock Street. He went to a cookout.

Q. So let me -- if we could back up, he rode his bike?

A. Yes.

Q. Okay. And does he have a motor vehicle?

A. Yes.

Q. Okay. But at this point he was riding his bike?

A. Yes.

Q. Okay. So what happened after he went to his mother's house?

A. He said he went to a cookout at his mother's house. He left his mother's house, went to another friend's house. That's who actually had his car. They went to Hudson and purchased I believe some type of music equipment from Cash Converters.

Q. Okay. What's Cash Converters?

A. It is a consignment shop where people buy and sell used goods.

Q. Okay. And he told you that he had purchased some music [156] equipment?

A. Yes.

Q. Okay. Did he tell you what he purchased?

A. I think it was an amp and a sub-woofer or a speaker box maybe.

Q. Okay. And were you aware of what he was alleged to have taken the night before?

A. Yes

Q. Okay. And it was essentially the same thing?

A. Yes.

Q. So just to clarify, what was he saying about his purchase at Cash Converters?

A. That that's what he had purchased that day.

Q. Okay. All right. And just so I'm clear, were you aware that Officer Clay had caught him holding some amps?

MS. KOWALEWSKI: Objection. Hearsay.

THE COURT: Sure.

(At sidebar)

MS. KOWALEWSKI: The basis of her knowledge is hearsay. Nicole Clay had testified already.

THE COURT: But this isn't being offered for the truth of the matter.

MS. LA FRANCE: No, it's just to see what her knowledge [157] was.

THE COURT: I mean –

MS. KOWALEWSKI: I'll withdraw the objection. Thank you.

THE COURT: Okay. All right. (Sidebar concluded.)

BY MS. LA FRANCE:

Q. Detective Phelps, were you aware of what the defendant had been carrying when Officer Clay stopped him?

A. Yes.

Q. What was he carrying?

A. Two amps, I believe.

Q. Okay. And just to clarify, when he told you he had bought some amps, was he -- what, if any, connection was he trying to make between the two of them?

MS. KOWALEWSKI: Objection.

THE COURT: Sustained.

BY MS. LA FRANCE:

Q. Did he -- I'm sorry. I'll withdraw it. So where did he say he was early that morning?

A. Early that morning I think he said he was at -- I don't know if it's girlfriend or just his -- the mother of his children. He was at her house on Amherst Street.

[158] THE COURT: I'm sorry. Could I just ask you -- I want to go back to the question you asked. Was he saying to you that the two amplifiers that he had been found with by Officer Clay were ones that he had bought at Cash Converters?

THE WITNESS: He didn't specifically say that, no.

THE COURT: Okay. But he did say he had bought two amplifiers at Cash Converters?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: I don't know if it was two or one, but he had said he had made a purchase of an amplifier at Cash Converters.

THE COURT: Okay. All right. Okay.

BY MS. LA FRANCE:

Q. But he -- so just -- he never -- he -- did he ever say the amplifiers I was caught with were the ones I bought?

A. No.

Q. Okay. So again, you said he was over his children's house and their mother's house on Amherst Street that day?

A. Yes.

Q. Okay. And what did he do later on that night of August 14th?

A. He said he went to a couple of friends' -- different [159] friends' house that night and ended up at the later part of the night on Willow Street at a friend's house.

Q. Okay. Where is Willow Street?

A. Willow Street is off of Central Street near Pine Street.

Q. Okay. And when he left -- so at some point he left Willow Street?

A. Yes.

Q. Okay. Where was he heading at when he left Willow Street?

A. He said that he was going to his cousin's house on Ash Street.

Q. And how far is Ash Street from the parking lot at 70 1/2 West Hollis Street?

A. Probably a couple hundred feet.

Q. Okay. So Ash Street is right next door?

A. Yes.

Q. Okay. With the Court's permission, if you feel comfortable, Detective, would you draw just a quick kind of street map of the locations that we're talking about, just so the jury can see where we're -- with the Court's permission.

THE COURT: Yeah.

BY MS. LA FRANCE:

Q. I'm just going to bring this up here. Okay. If you [160] can, Detective, just kind of draw a quick map of where Willow Street is and then the surrounding streets that the defendant mentions that he traveled when he encountered Officer Clay. I don't mean to put you on the spot.

A. That's all right.

Q. Well, I do, but --

A. This would be Willow and this is Central. Go down, this would be Pine. Pine crosses over onto West Hollis Street.

Q. Okay. If you could just put an arrow indicating which way I guess is west.

A. This is west.

Q. Okay. And I'm not sure how much -- how many people in the jury are familiar with this area, if you were from Nashua. The district court is located somewhere around there, right, the old --

A. Yep, the district court is on this end of Central Street.

Q. Okay. And if you could just note -- write down that that's district court, just for the record.

A. (Witness complies.)

Appendix I

Just if you head easterly down West Hollis Street, 70 1/2 West Hollis Street is like midway. And the parking lot is just adjacent to it, so this would be the parking lot, this way. [161] Ash Street is this cross street here.

Q. Okay. So the parking lot is east of 70 1/2.

A. East of 70 1/2. And so is Ash Street.

Q. All right. So early that morning the defendant said he was at Willow Street?

A. Yes.

Q. Okay. And where did he say he went?

A. He said he walked down Pine Street to West Hollis Street.

Q. Okay. And then he was heading to Ash Street, he said?

A. Yes.

Q. Okay. So would it be logical for him to maybe cut through that parking lot?

A. If I -- if I were going, no, but --

Q. But it's definitely in the path, right?

A. It's in the path, yes. It's in the same direction of where he was going.

Q. Okay. All right. And how did he say he was getting from Willow Street to Ash Street?

A. He indicated that he was walking.

Q. Okay. Because you can't -- obviously you can't drive east down West Hollis Street, right?

A. Correct.

[162] Q. Okay. All right. Thank you, Detective Phelps.

MS. LA FRANCE: And, Your Honor, I would ask that this be marked as State's I guess Exhibit 14.

THE CLERK: 13.

MS. LA FRANCE: 13, I'm sorry.

THE COURT: Any objection?

MS. KOWALEWSKI: No.

THE COURT: All right. That may be marked.

(Diagram Marked State's 13 in evidence.)

BY MS. LA FRANCE:

Q. So when the defendant encountered Officer Clay, what was he doing?

A. He said that he was in the parking lot of 70 1/2 West Hollis Street.

Q. And what did he say he observed in the parking lot?

A. He said sitting in the middle of the parking lot, he observed a speaker and two amps just in the middle of the parking lot.

Q. Okay. And just to be clear, what, if any, mention did he make of having a bike?

A. No mention at all.

Q. Okay. And what, if any, mention did he make of him kind of circling around the parking lot?

[163] A. He didn't make any mention of that.

Q. Okay. What did he say was his path through that parking lot?

A. He said that he was cutting through to go to 32 Ash Street.

Q. Okay. And what did he say about any stops he made at any of the cars in the parking lot?

A. He didn't make any mention of stopping at any cars.

Q. And besides the items in the middle of the parking lot, did he say he saw anything else?

A. He said that it was dead silent and that he thought that he had saw three of his friends in the parking lot.

Q. Okay. And where were these friends?

A. He said that he saw them cut through 70 1/2 West Hollis Street. He came behind them and by the time he turned the corner they were gone.

Q. Okay. So he said that he saw them and he went to go find them, but they were gone?

A. Yes.

Q. All right. And at that time, what did he hear in the parking lot?

A. He said it was dead silent.

Q. Okay. So when his friends were in the parking lot, he [164] didn't hear anything?

A. He didn't indicate that he heard anything.

Q. Okay. So what happened -- what did he say happened when he encountered Officer Clay?

A. He said when he saw Officer Clay he had the amps in his hand and he was just moving them.

Q. Where was he moving them to?

A. He didn't say where he was moving them to.

Q. Okay. What was he going to do with them?

A. He didn't say. He only said he was moving them out of the way.

Q. All right. And where did he say the speaker was at that time?

A. He didn't say.

Q. And what did he have in his hands when he encountered Officer Clay?

A. I believe he said he had the two amplifiers in his hand.

Q. And later on you ask him about the wrench that he had on his person?

A. Yes.

Q. Where did he say the wrench came from?

A. He said that it was his wrench and he had used it to repair his bikes or his bike.

[165] Q. Just to be clear, he didn't have his bike with him, he said?

A. No.

Q. Okay. So this was the first time that you spoke to him that morning?

A. Yes.

Q. Okay. Did you have another conversation with him?

A. Yes.

Q. Okay. And before you spoke with him, did you review anything with him?

A. Yes, I reviewed his *Miranda* rights with him again.

MS. LA FRANCE: Okay. Your Honor, may I approach?

THE COURT: Yes.

MS. LA FRANCE: I'd ask that this be marked as State's 14.

MS. KOWALEWSKI: No objection. Your Honor, I have no objection to this being marked as a full exhibit.

THE COURT: All right. It may be marked next exhibit. (*Miranda* form marked State's 14 in evidence.)

BY MS. LA FRANCE:

Q. And, Detective Phelps, this *Miranda* form is essentially -- served the same purpose as the prior form?

A. Yes.

[166] Q. And I'm showing you what has been entered as State's 14. Do you recognize that?

A. Yes.

Q. What is that?

A. This is a second *Miranda* form that I reviewed with the defendant.

Q. Okay. And while you were reviewing this *Miranda* form, did that review go as smoothly as the first one?

A. No, he had asked a couple questions this time.

Q. Okay. Well, what was he saying?

A. I think his first question was would he need a lawyer.

Q. Okay. And how did you respond?

A. I explained to him that he did not need one unless he wanted one; that if he did want one and did not wish to speak with me, that I would not ask him any more questions and I would -- an attorney will be provided for him.

Q. Okay. And what did he say in response to that?

A. He said, no, he didn't want a lawyer and he wanted to speak with me.

Q. Okay. Did he have any other questions that you can recall about what his rights were?

A. Not that I can recall.

Q. Okay. And again, did you have him read the waiver [167] portion?

A. Yes.

Q. And did he agree to speak with you?

A. Yes.

Q. Okay. At this time, why did you have to go back to speak with him again?

A. Well, after I spoke with him, again, I reviewed the report and I also listened to some of the first interview and a couple of things just didn't add up to me, so I just wanted to clarify a few issues with him.

Q. Okay. And were you able to clarify those issues?

A. Yes.

Q. Okay. And what did he say that clarified the issues for you?

A. Well, not so much as clarify as opposed to contradict what he said. Initially he told me that he had rode his bike from Amherst Street to his mother's house. At some portion throughout the interview with him he told me that the wrench that he -- he had a wrench to fix his bike because his bike had a flat tire and that it was still on Amherst Street so that didn't make much sense to me.

Q. Okay. And how did he respond to that when you confronted him with those –

[168] A. He just continued to say that the wrench belonged to him and that the bike was broken and had a popped tire and that it was on Amherst Street.

Q. And what, if any, admissions did he make about breaking into Alex Clavijo's car?

A. No admissions at all. He said he didn't break into the car at all.

Q. Okay. What, if any, admissions did he make about his knowledge of maybe the nature of the amps that he was carrying?

A. I think the only thing he said about them is if anybody stole them, it was the three guys that ran through the lot prior to him getting there.

Q. Okay. And what, if any, knowledge did he have of whether or not those amps were stolen?

A. What I understood from him was that he thought that they were stolen, but he just didn't steal them.

Q. Okay. And when you were conversing with him, at some point he talks about getting some forensic evidence. Do you recall that --

A. Yes.

Q. -- line of conversations? And he -- what did he say about fingerprinting? What specific portion of the victim's car was he asking to fingerprint?

[169] A. The trunk.

Q. Okay. And just so I'm clear, in the transcript, the transcript that the jury will see, does he mention the trunk specifically?

A. Yes.

Q. Okay. Had you told him where the items were taken out of Alex's car prior to that?

A. No.

Q. Okay. And how did he explain this?

A. That it would be common knowledge that those items would be kept in the trunk of a car.

Q. Okay. So the defendant, he knew that if anybody had a big stereo system, it would be kept in the trunk?

A. Yes.

Q. Okay. And that's how he explained his knowledge of where the items were taken?

A. Yes.

Q. And if you look at the transcript there -- I'm sorry. I'll get back to that.

But your recollection of when he talked to you about getting these fingerprints, he specifically mentioned the trunk?

A. Yes.

Q. Okay. And just to be clear, Alex Clavijo had a car, [170] right?

A. Yes.

Q. Okay. He didn't have a truck?

A. Yes. No.

Q. I'm sorry. And during your conversation with him, you said he didn't make any admissions to taking the items out of Alex's car?

A. No.

Q. Okay. And I want to talk to you about your conversation with Mr. Perry, the defendant. When you

were conversing with him, what was your attitude during your conversation with him?

A. I think it went a little bit back and forth. It was friendly and then frustration.

Q. Okay. Did -- you lied during your conversation with him. Is that right?

A. Yes.

Q. Okay. Are you permitted to lie when you're speaking to a suspect?

A. Yes.

Q. Okay. And what were you saying to him?

A. That we had collected all sorts of evidence from the scene.

Q. Okay. But there was some information you gave him that [171] was accurate as far as you knew, right?

A. Yes.

Q. Okay. What did you tell him about whether he had been observed or not?

A. I told him that there were witnesses that saw him the whole time that he was in the parking lot, saw exactly what he had done.

Q. Okay. And how did he respond to that?

A. I don't think he made any denials that he was seen in the parking lot at all.

Q. So did he have any explanation for that?

A. No.

Q. And when you were conversing with him, you were using some pretty strong language. Is that right?

A. Yes.

Q. Okay. And the jury will see that in the transcript. Language we won't repeat here. And why did you decide to take this approach?

A. Frustration. Just the way that the interview was progressing and his denials, even after telling him that two people observed him the whole time.

Q. After your conversations with the defendant, what other investigation did you do?

[172] A. I interviewed both the witnesses in the case.

Q. Okay. And who were those witnesses?

A. Nubia Castro and Mr. -- I can't pronounce his name. I don't want to destroy it.

Q. Was it Joffre?

A. Yes.

Q. Okay. And they were both Hispanic?

A. Yes.

Q. All right. And you actually had them come in for an interview?

A. Yes.

Q. Okay. And that was -- when you were speaking with -- just so I understand, they're husband and wife, correct?

A. Yes.

Q. All right. And when you were speaking with Joffre, did you converse with him in English?

A. Yes.

Q. Okay. Were you able to understand him okay --

A. Yes.

Q. -- when you were speaking with him? Okay.

And when you spoke with Joffre, did you show him anything?

A. Yes, I had constructed a photo array to include a [173] photograph of the defendant and I showed that to him.

Q. Okay. And –

MS. LA FRANCE: May I approach, Your Honor?

THE COURT: Yes.

BY MS. LA FRANCE:

Q. And I'm showing you what has been marked for identification as State's 11. Do you recognize that?

A. Yes.

Q. What is that?

A. That is the photo array that I generated.

Q. Okay. And specifically the writing that's on it, who made that writing?

A. Joffre did.

Q. Okay. And what was that writing in response to?

A. I asked him to indicate who was the person that he saw in the parking lot on the date that Alex's car was broken into.

Q. Okay. And that's the person he said he saw?

A. Yes.

Q. Okay. How do you know that?

A. Because it is circled, dated, and initialed by Joffre.

Q. And when did he make this identification?

A. I believe it was about one month after this investigation.

[174] Q. Okay. Is the date on there?

A. Yes.

Q. What's the date?

A. 9/21/08.

Q. Okay. So it was actually more than a month after this incident occurred?

A. Yes, I believe it was in August.

MS. LA FRANCE: Okay. All right. Your Honor, I would ask that the identification be struck and this be --

MS. KOWALEWSKI: No objection.

THE COURT: Well, before we get to that, who is the person that was circled?

MS. LA FRANCE: Oh, I'm sorry, Your Honor.

BY MS. LA FRANCE:

Q. Who is the person that he circled?

A. The defendant.

THE COURT: Yes, it may be marked as a full exhibit and may be published to the jury.

(State's 11 admitted into evidence.)

BY MS. LA FRANCE:

Q. And, Detective Phelps, that's the photo array that you showed to Joffre, as the jury will see, it doesn't have any names on it, right?

[175] A. No.

Q. So how do you know that it was Barion Perry that he --

A. I also produced one that has all the names of everyone on the array.

Q. Okay. Just to be clear, Joffre never saw the one that had everybody's names on it?

A. No, that's just for the detectives to list so that they know who the photographs belong to.

MS. LA FRANCE: Your Honor, may I have this marked as State's 14?

THE COURT: All right. Any objection?

MS. LA FRANCE: As a full or --

MS. KOWALEWSKI: I have no objection to it coming in as a full.

THE COURT: All right. Marked as State's next exhibit. (Photo array with names marked State's 15 in evidence.)

BY MS. LA FRANCE:

Q. I'm showing you what has been entered as State's 15. Do you recognize that?

A. Yes.

Q. Okay. And what is that?

A. That is just the same photo array they have with all the names of all the individuals on it.

[176] Q. And that's so you can make sure you have the right people?

A. Yes.

Q. Okay. And, Detective –

MS. LA FRANCE: I'm sorry, Your Honor. May I have this published to the jury?

THE COURT: Yes.

(Exhibit published to jury.)

BY MS. LA FRANCE:

Q. Detective Phelps, when you create these photo arrays, how do you go about doing it? It's all pretty much computerized now, right?

A. Yeah, it's computer generated. You can choose the age, the weight, the sex, the race, hair color, pretty much any identifying physical feature.

Q. Okay. And why do you have to do that?

A. So that you can get a comparative photograph that -- either you narrow down specifics or you'll get a million photographs, so you narrow it down so that the physical characteristics match.

Q. Okay. And as the jury can see from the lineup, the photo array consisted of all black men who look rather young?

A. Yes.

[177] Q. All right. Why do you have to do that?

A. As to not prejudice the person that is viewing it so that, you know, you put one black guy in the middle of an array of all white guys, it would be easy to identify. So you do it so that the physical characteristics match and either they know who it is or they don't.

Q. Okay. And when you showed the photo lineup to Joffre, again, the one with the names on it he never saw, right?

A. Correct.

Q. Okay. What, if any, hints or indications did you give to him about who the defendant was in the photo array?

A. Not at all.

Q. Okay. How did you conduct the photo array? What did you do?

A. I present it to him. I tell him why I'm showing the array, that I want to know if he can identify the person that he saw in the parking lot. I also tell him that the person could or could not be in there, so don't feel obligated to pick someone.

Q. Okay. And after you told him this, what did he do?

A. He immediately picked number two.

MS. LA FRANCE: Okay. One moment, Your Honor.

BY MS. LA FRANCE:

Q. And you said you also spoke to Nubia, his wife, about [178] this?

A. Yes.

Q. Okay. And you obtained a statement from her as well?

A. Yes.

Q. Okay. And were you able to converse with her in English?

A. No.

Q. Okay. And who did you use as a translator?

A. Officer Santiago.

Q. And who is Officer Santiago?

A. He is a police officer at Nashua police.

Q. Okay. And he speaks both Spanish and English?

A. Yes.

MS. LA FRANCE: Okay. One moment, Your Honor.

BY MS. LA FRANCE:

Q. And, Detective Phelps --

MS. LA FRANCE: Your Honor, I'm not sure if we want to mark one of these transcripts as the State's full exhibit.

THE COURT: Sure. Okay. We can do that.

MS. LA FRANCE: Okay. And then we can just supply the jury with the rest of them?

THE COURT: Yeah.

(Counsel confer.)

[179] MS. KOWALEWSKI: No objection.

THE COURT: All right. May be marked as the next exhibit.

MS. LA FRANCE: State's 16.

(Transcript marked State's 16 in evidence.)

BY MS. LA FRANCE:

Q. And I'm showing you what has been entered as State's 16. Do you recognize that document?

A. Yes.

Q. What is that?

A. It is a transcript of the interview that I had with the defendant.

Q. And are both interviews in there?

A. Yes.

MS. LA FRANCE: Okay. Thank you. Thank you, Detective. No further questions. You may inquire

THE COURT: Cross-examination.

CROSS-EXAMINATION BY MS. KOWALEWSKI:

Q. Morning, Officer Phelps.

A. Good morning.

Q. Detective Phelps, I'm sorry. I want to talk a little bit first about the conversations that you had with Mr. Perry. Okay? So I want to talk a little bit about the first interview. [180] [Phelps - Cross] Happened at 9:30 in the morning?

A. Yes.

Q. Okay. And Mr. Perry had been at the police station the whole entire time?

A. Yes.

Q. Since his arrest the night before?

A. Yes.

Q. And to the best of your knowledge, he hadn't gone to the hospital or been treated by EMTs for any injuries, correct?

A. Correct.

Q. You were able to observe his person during that interview, right?

A. Yes.

Q. And you were able to observe the clothing that he was wearing?

A. Yes.

Q. And that clothing was the same clothing he was wearing when he was arrested? To the best of your knowledge.

A. To the best of my knowledge, yes.

Q. He didn't -- you didn't notice any cuts on his hands, did yo?

A. No, I didn't make any observation of any cuts.

Q. Or on his arms?

[181] A. No.

Q. His clothing wasn't torn or shredded?

A. No.

Q. Okay. And he didn't have any blood on him?

A. No.

Q. So in that first interview he told you about his day, right?

A. Yes.

Q. Okay. And he said he started his day -- said he started his day with his family on Amherst Street, correct?

A. Correct.

Q. Okay. And then he rode his bike to his mother's house, right?

A. Yes.

Q. Okay. And that then he actually went to Cash Converters and bought an amp, right?

A. Yes.

Q. And he actually denied stealing anything that night, right?

A. Yes.

Q. Even when you pushed him. Even when you told him you had all this evidence, he denied, denied, denied stealing?

A. Yes.

[182] Q. Okay. Even when you told him that five or six people had seen him, he denied, right?

A. Yes.

Q. Okay. And even when you lied and told him there were going to be his fingerprints in the car, he said, my fingerprints aren't going to be in the car, and he denied breaking in, right?

A. Yes.

Q. Okay. And he consistently told you -- excuse my language -- I'm not bullshitting you, I didn't do this, right?

A. Right.

Q. And I'm telling you the honest to god truth, I'm not lying, I didn't do this, right?

A. Right.

Q. In that first interview.

A. Yes.

Q. And the second interview, that happened at around noon, right?

A. Yes.

Q. Okay. Told you the same -- almost the same thing he told you in the first interview, right, about seeing three people going through the alley in front of him?

A. Yes.

Q. Okay. He also told you that he had seen TVs and other [183] electronics in the trash in that area before, right?

A. I don't recall him saying that.

Q. Okay. So he again told you he saw the amp in the middle of the driveway, right?

A. Yes.

Q. Okay. And that he moved it.

A. That he was going --

Q. He was in the process of moving it?

A. Yes.

Q. And that he had just bought his own set, right, of amps?

A. Yes.

Q. And that he wouldn't need to steel something that he already had, right?

A. No.

Q. Okay.

A. No, he didn't say that, is what I mean.

Q. Okay. He actually told you it looked like someone had taken their stuff and dropped it in the middle of the ground, right?

A. No.

Q. This was audio/video recorded, right?

A. Yes.

Q. And a transcript was made, right?

[184] A. Yes.

Q. So would it shock you if on Page 197 Mr. Perry says, "It looks like somebody just took their shit out and threw it on the fucking sidewalk"? Would it surprise you if the transcript said that?

A. If the stuff -- if he said he picked it up off the sidewalk, that's not what he said to me.

Q. So the transcript is wrong?

A. No, he didn't say that he had gotten -- he said the amp and stuff was in the middle of the parking lot and that something else was on the sidewalk. I didn't make the correlation that someone had thrown this stuff on the sidewalk because that's not where he told me he got it from. He said it was in the middle of the parking lot.

Q. Somebody just dropped it on the ground?

A. I thought you just said "sidewalk." I'm sorry.

Q. And somebody just dropped it on the ground. Would it shock you that the transcript said that?

A. No, that wouldn't shock me at all.

Q. Okay. And he denied breaking -- actually breaking into the car, right?

A. Correct.

Q. And he consistently denied throughout both interviews, [185] right?

A. Right.

Q. Okay. Talk to you a little bit about the photo arrays. You had talked about Joffre coming in and doing the photo array, right?

A. Yes.

Q. And you also talked about his wife coming in and doing the photo array, right?

A. Right.

Q. And you did the same process with each of them, right?

A. Yes.

Q. Okay. I want to focus on Ms. Castro for a minute. Okay?

A. Yes. Uh-huh.

Q. During the course of your investigation, you learned that she was the eyewitness, right?

A. Yes.

Q. Okay. So you had her come in to talk to her, right?

A. Right.

Q. Okay. And she came in voluntarily, right?

A. Yes.

Q. Okay. And you provided her with instructions as to how to do the photo array, right?

[186] A. I believe Officer Santiago was present with me, so he relayed the information to her.

Q. Okay. He was interpreting because she hasn't -- she speaks Spanish mainly, right?

A. Correct.

Q. Okay. And through him you gave her instructions as to how to do the photo array?

A. Correct.

Q. And you told her, you don't have to pick anyone out, right?

A. Correct.

Q. And that she should take as much time as she needed in looking at those pictures, right?

A. Correct.

Q. Okay. And to look at all those pictures closely, right?

A. Correct.

Q. And you wanted to make sure she did this so that she gave you an accurate identification, right?

A. Yes.

Q. And Officer Santiago is translating during this whole entire time?

A. Correct.

Q. You asked her if she had any questions, right?

[187] [Phelps – Redirect] A. (No verbal response.)

Q. She didn't have any questions.

A. Correct.

Q. She couldn't pick anyone out of a photo array, right?

A. Correct.

Q. And you would agree that during your interview of her -- with her, the descriptions that she gave were pretty sparse, right?

A. (No verbal response.)

Q. She couldn't tell you what the person she saw was wearing, for instance.

A. Correct.

Q. She couldn't tell you about facial features, eye color, facial hair, things like that, right?

A. Correct.

Q. Okay. And she couldn't tell you about earrings, piercings, or tattoos.

A. Correct.

MS. KOWALEWSKI: Thank you, Detective. I have no further questions.

THE COURT: Redirect.

REDIRECT EXAMINATION BY MS. LA FRANCE:

Q. Detective Phelps, I just want to clarify. When you [188] interviewed Nubia, the person you knew who had eyewitnessed this, what was your knowledge of where she was located when she saw this person in the parking lot?

A. Inside her apartment.

Q. Okay. And do you know what floor she lived on?

A. I think either third or the fourth. I'm not sure.

Q. Okay. And what was your knowledge of where Joffre was when he saw the individual?

A. He said that he saw him both out the window and he came face to face with him when he went downstairs.

Q. Okay. So who had a closer view of this person that they saw?

MS. KOWALEWSKI: Objection.

THE COURT: Basis?

MS. KOWALEWSKI: Can we approach?

THE COURT: Sure.

(At sidebar.)

MS. KOWALEWSKI: Hearsay. And it's a conclusion based upon testimony or witnesses that have already been presented.

THE COURT: I think it's proper, but you can argue that the element shows that, but I don't think –

MS. KOWALEWSKI: Okay. All right. I'll withdraw it.

(Sidebar concluded.)

[189] [Motion] MS. LA FRANCE: I have no further questions.

THE COURT: Any recross?

MS. KOWALEWSKI: No, thank you.

THE COURT: Thank you very much, Officer. You may step down.

(Witness excused.)

MS. LA FRANCE: State rests, Your Honor.

MS. KOWALEWSKI: Can we approach?

THE COURT: Yes.

(At sidebar.)

MS. KOWALEWSKI: At this point I'd like to make a motion pursuant to *State v. Evans*, that even in the light -- even taking the evidence in the light most favorable to the State, the State has not established enough to get this to the jury just because of the weaknesses in the identification.

Thank you.

THE COURT: Okay. That's denied. Okay. So?

MS. KOWALEWSKI: I intend to call Mr. Perry. I don't know if Attorney LaFrance needs to take a break just to gather her thoughts, but I intend to call my client.

THE COURT: Well, now –

(Court and counsel confer.)

THE COURT: Now what are we going to do about the [190] issue? I mean, it seems to me his prior convictions will come in on impeachment. I mean, I can't imagine -

MS. KOWALEWSKI: He's insisting on testifying. I can't tell him not to testify pursuant to my oath.

THE COURT: No, no. I understand. Why don't we excuse the jury for just a moment?

MS. KOWALEWSKI: Sure.

(Sidebar concluded.)

THE COURT: Ladies and gentlemen, the State has rested. I'm going to ask you to step outside for just a couple of minutes back into the jury room. I need to discuss some legal matters with counsel. Okay?

Please don't discuss the case during the recess.

(Jury excused from courtroom.)

THE COURT: All right. Mr. Perry, it's my understanding from the conference I just had at the bench that it's your intention to testify. Is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. All right. That's fine. I just want to make sure -- I'm sure that your counsel, Ms. Kowalewski, has discussed this with you, but I just want

to make sure you understand that we previously at the beginning of the case had a discussion before the trial started about the fact that you had [191] stipulated about your prior convictions so that it was removed from the case and the jury would not hear about that, and pursuant to the stipulation the jury has not heard about that.

But I want to make sure you understand, sir, that if you now testify, it -- your prior convictions will now become relevant to your credibility so that those prior convictions very likely will be admitted in evidence and cross-examination of you. And I tell you that just because I want you to understand you have the absolute right to testify if you want to and that's completely up to you. You know, you could decide either to testify or not testify, completely up to you what you want to do.

But you should understand that if you do testify, it is very likely that the State will be able to elicit on your cross-examination the fact that you have these prior convictions; and, you know, that -- I mean, you should -- I will instruct the jury that they are only -- they are to be admitted only on the issue of your credibility, not on -- you know, not so that the jury should say, well, if he was convicted before, you know, he must have done it again.

THE DEFENDANT: Yeah, I understand that, Judge.

THE COURT: Do you understand? I will tell them that they can only consider it for your credibility, but, you know, you should understand that that's going to be

pretty powerful [192] cross-examination I suspect. Again, completely up to you, but I just want to make sure you understand that --

THE DEFENDANT: May I explain something, Your Honor?

THE COURT: You don't have to explain anything. You don't have to explain anything to me. I just want to make sure that you completely understand your rights.

THE DEFENDANT: The main thing I want to say, Your Honor, my reason for wanting to testify, Your Honor, is that I'm the only one that could truly explain the person that I am now and not the person that I was. You see what I mean?

THE COURT: That's fine. As I say, it's completely your right to testify if you like.

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

MS. LA FRANCE: Your Honor, I guess if he's going to testify, I'm allowed to impeach him, then now I would ask to reopen the State's case so we can put in the video. I mean, the only reason why I did that is because he had stipulated to the priors and, I mean, now I'm prejudiced again because I didn't get to bring in the videotape of his statement --

THE COURT: You may use the videotape to cross-examine him. You may, you know, you may -- you certainly may do that. I understand what you're saying. If you want to cross-examine, [193] well, didn't you say this to the officer, you can play the tape and have the jury hear the tape.

MS. LA FRANCE: I put the TV back.

THE COURT: Okay. Well --

MS. LA FRANCE: I mean, it's convoluted, I mean, the videotape itself I think, you know, the State is now prejudiced because we had originally intended to show the video, I mentioned it in my opening, and then because of the stipulation I had to redact and prepare all this, and now this is -- to me, I mean, now the transcript doesn't need to be redacted because he's talking -- apparently his intent is to talk about his past and what a changed man he is.

THE COURT: That -- you -- I assume --

MS. KOWALEWSKI: I wasn't going to ask about that, but --

THE COURT: I assume that you have some -- I assume you have the tape here.

MS. LA FRANCE: I do.

THE COURT: Okay. And I assume you have an unredacted copy of the transcript.

MS. LA FRANCE: I do.

THE COURT: All right. So you may use that and I will explain to the jury that, you know, the legal reasons for -- [194] depending on what the defendant says in his direct, that the legal reasons for the redaction no longer apply. I mean, we'll have to see what he says, but that may very well be the case.

MS. LA FRANCE: Okay. And just to clarify with Your Honor, I'm counting four prior felony convictions that fall within the guidelines of 609. There are two thefts and two burglaries. In the indictment I alleged one prior burglary, as well as the two thefts, but there's actually four felony convictions.

THE COURT: And what are the ages of these?

MS. LA FRANCE: I think the earliest one is from 1999. It was February of 1999, however, it was a suspended sentence, so the back end of the sentence falls within the ten-year window. And then the other ones, there was a burglary from 2007.

THE COURT: Okay. All right.

MS. LA FRANCE: And the thefts are, again, from 2007 --

THE COURT: And these are all felonies?

MS. LA FRANCE: Felony thefts, felony burglaries.

THE COURT: Okay. All right.

MS. LA FRANCE: Well, I mean, he has a number of misdemeanors, but those --

THE COURT: Right. Right. I understand.

MS. LA FRANCE: I don't think there's anything for [195] veracity in there, so.

THE COURT: Okay.

MS. LA FRANCE: That's why I'm counting.

THE COURT: All right. Anything?

MS. KOWALEWSKI: No. Thank you.

THE COURT: Okay. All right. Very well. Let's bring back the -- bring the jury.

MS. LA FRANCE: And, Your Honor, I guess at some point I put the TV back.

THE COURT: Well, after the direct we'll take a recess and –

MS. LA FRANCE: I'm sorry, Your Honor. Can we approach briefly while the jury comes in?

THE COURT: Sure.

(At sidebar.)

MS. LA FRANCE: I guess -- I don't know what his testimony is going to be, but if he opens the door, he may very well open the door to his misdemeanor convictions. He just said, "I'm not that person anymore." He's in jail right now --

MS. KOWALEWSKI: It depends on what he says on direct.

THE COURT: Depends on what he says. Depends on what he says.

MS. LA FRANCE: Okay.

[196] [Perry – Direct] (Sidebar concluded.)

(Jury present in court.)

THE COURT: Ladies and gentlemen, the State has rested its case, and the defendant now has the opportunity, but no obligation, to present any evidence that the defense may decide to present.

MS. KOWALEWSKI: Thank you, Your Honor. The defense calls Mr. Barion Perry, please.

THE COURT: All right.

BARION PERRY, DEFENDANT, SWORN.

MS. KOWALEWSKI: Please have a seat.

DIRECT EXAMINATION BY MS. KOWALEWSKI:

Q. Can you introduce yourself to the jury, and spell your last name for the record, please?

A. Yes. My name is Barion Perry, and my last name, P-e-r-r-y.

Q. Barion, when were you born?

A. 9/5/79.

Q. Okay. Where are you living currently? Where were you living on August 14th, 2008?

A. I was living with my girlfriend and my kids.

Q. And where do they live?

A. On Elmhurst Street.

[197] Q. Okay. How many kids do you have?

A. I have three.

Q. How many did you have on August 14th?

A. August 14th -- three.

Q. Three? I want to talk to you a little bit about August 14th, the morning of August 14th. Where did you wake up?

A. At home with my family.

Q. Okay. And that's with your three children?

A. Yes, ma'am.

Q. And who else?

A. My girlfriend, which is --

Q. What's her name?

A. Ashley Paradise.

Q. Did you spend the whole morning there?

A. Yes. And for the -- a good portion of the morning, until my girlfriend went to work, and we dropped off my kids at daycare.

Q. Did she drop them off at daycare?

A. Yes, ma'am.

Q. Okay. And what did you do at that point when they left for daycare and work?

A. Well, I do -- I took a shower and everything, ate my breakfast because they get up earlier than I did.

[198] Q. Did you get -- did you put on a change of clothes?

A. Yes.

Q. What did you -- what were you wearing that day?

A. I had on a black Avirex thermal with blue jeans.

Q. Okay. Did you put any tools or anything in your pocket that day?

A. I have my -- I always carry tools with me when I ride my bikes.

Q. What tools did you have that day?

A. I had an Allen wrench and I had a vise grip.

Q. Okay. Can you describe what each one of those tools looked like -- looks like for the jury, please?

A. My Allen wrench is in a "L" shape and is used for adjusting my handlebars because I ride bikes every day. I do tricks on my bikes. And I ride mine every day. And my bike is known to break every -- every now and then.

Q. Okay. And what's the other -- what was the other tool that you had?

A. And the other one is my -- just my vise grip.

Q. Okay. And what do you use that for?

A. That's to tighten up my handlebars and to fix my front tire because my back tire has pegs on it.

Q. Okay. Where did you purchase those tools?

[199] A. My tools, I had a whole Stanley tool set, and that came from Best Buy.

Q. Okay.

A. I mean -- excuse me, no; Wal-Mart. It's a Wal-Mart tool. And I didn't buy it myself.

Q. Okay. But somebody bought it for you?

A. Yes.

Q. Okay. Now, you get changed, you put your clothes on, you put your tools in your pockets, and you leave. And where were you going?

A. I was going to my mother's house. And --

Q. And where does she live?

A. On Lock Street.

Q. And how did you get there?

A. I -- well, I rode my bike.

Q. What kind of bike do you have?

A. I had a twenty-inch GT dirt bike --

Q. What color is it?

A. It was aluminum.

Q. Okay. So is it like a gray -- a silver type of color?

A. Yes. Yes.

Q. Okay. Did anything happen to -- unusual happen to your bike along the way to your mom's house?

[200] A. Yes. I made it all the way down Amherst Street, and right past the Holman Stadium, a bunny hopped over a curb, and when I came down, my back tire came down harder than my front tire did, and I smacked the edge of the curb and blew my tire out.

Q. When you say you blew your tire out, what does that mean?

A. I mean, when I hit the -- I hit the edge of the curb, my rim smacked the curb too hard that it just blew out the tire. It blew a rip in the side of my tire.

Q. So did it get flat?

A. Yeah. I could hear the air seeping out, so I pedaled even faster and tried to get at least closer and closer to my mother's house. And -- but I rode it on the flat until I got right -- just before the Amherst Fire Department across from Jay's Variety.

Q. Okay. So the fire -- you stopped -- you couldn't ride it anymore past the fire department?

A. No.

Q. Okay. So what happened to your bike?

A. I ditched my bike in the back yard of a house and put it in the bushes. I left it in the bushes in the back of a building, the house before the fire department.

[201] Q. And how did you get to your mom's house?

A. I walked the rest of the way.

Q. Okay. Now, your mom lives where?

A. It's not -- probably about another ten-minute walk from the fire department.

Q. Okay. On what street?

A. Lock Street.

Q. Okay. And what was going on at her house that day?

A. My mom was getting ready for a cookout, a family cookout that we had with my aunts, which is also in the audience.

Q. Okay. So who else -- who had been invited to this cookout?

A. My whole family and friends. There's many people.

Q. Okay. And was that in full swing when you got there?

A. It was just starting. That's the point I went to my mom's house, because I hang out with my mother every day.

Q. Okay. How long were you there until you went to Cash Converters?

A. I would say a good -- probably a good two, two hours, two and a half hours, and --

Q. How did you get to Cash Converters?

A. Well, I purchased a truck the same day.

Q. Okay.

[202] A. I purchased a blue Chevy Silverado Suburban for $3,500 at Megabucks Auto.

Q. Okay.

A. And I tried to get my girlfriend to register it because I was going to put it in her name for her. It was a -- it's an eight-passenger truck, and I got three babies, so ...

Q. Okay. So you bought the truck for her that day as well, and then you went to Cash Converters?

A. Yes. Yes.

Q. Why did you go to Cash Converters?

A. I went to Cash Converters so I could get myself a system for it.

Q. Okay. When you say a system, what do you mean?

A. I bought a five-hundred-watt Sony Xplod red -- a red Sony Xplod amplifier, and I bought a wooden box, just regular brown wood Eclipse sub-woofer.

Q. Okay. Now, why did you purchase those?

A. So that way I would have my -- my beats for my truck.

Q. Is that a hobby of yours?

A. Yes. Yes. A -- I fix cars. I went to college for it.

Q. Okay.

A. I graduated from NH Voc-Tec to -- as a mechanic.

Q. Okay. So what happened -- what did you do after you got [203] done purchasing items at Cash Converters?

A. Well, I had -- the guy that drove my truck out there, he -- I had him help me put all my -- put my stuff in the back of the truck, and my amp. And then I went to

my aunt's house which -- with my truck to do the system, then, but I didn't have the proper tool to put it under my -- underneath my hood.

Q. Okay. Where does your -- it was your aunt, right, that you were going -- whose house you were going to?

A. Yes.

Q. Where does she live?

A. She lives on -- she lives on Walnut Street. And --

Q. On Walnut Street?

A. Yes. And by the -- when I got there, that's where the rest of my family was.

Q. Okay. I want to step back for a little bit.

You heard Detective Phelps talk about the tree streets and Ash Street.

A. Yes.

Q. And I want to make -- I want to talk to you about that. How long had you -- has your mom and your family lived on the tree streets?

A. My aunt, she lives on the -- she's been living on the tree street since I would say about 2007, 2008.

[204] Q. Okay.

A. She's been living on Walnut Street.

Q. Okay. But you've been familiar with the tree streets for a while, right?

A. Oh, yes, ever since I've been in New Hampshire.

Q. Okay. How long have you been in New Hampshire?

A. Nineteen years. I went to grade school here. I went from junior high to high school here.

Q. Okay. And why are they called the tree streets?

A. Because every street is named after trees.

Q. Okay. I want to talk a little bit about how the area is set up, okay? Are there apartment buildings there, houses? What does it look like?

A. There's -- well, the area that I was in, there's a lot of apartment buildings, big buildings really.

Q. Okay. Like skyscrapers?

A. No. Like at least four stories high. It would -- each floor has at least four to eight apartments on each floor.

Q. So it's like the older Colonial-type of houses?

A. Yes.

Q. Okay. And how would you describe the community on the tree streets? Do people know everybody?

A. Yes.

[205] Q. Would you know somebody -- would you know everybody by name?

A. I have a lot of friends I know by nickname, and I have a lot of friends -- I'm pretty popular around Nashua. A lot of people know me in Nashua.

Q. Okay. But would you -- if you saw -- you wouldn't know everybody by name?

A. Not by their real name, no. I know a lot of people by nicknames and everything, and I know people just from -- through passing.

Q. Okay. And by face, right?

A. Yes. Yes.

Q. Okay. Now, the streets themselves aren't the only way -- or aren't the only ways to kind of get around on the tree streets, right?

A. Oh, no.

Q. No. What other passageways or, you know, walkways are there on the tree streets?

A. Well, the property walkway is the Mine Falls bike trail. It starts off on the tree streets, there's a bike trail, and there's a -- the further you go up, it turns into Mine Falls, which I ride a lot.

Q. Okay. Can you see that -- can you see the whole bike [206] trail from the street?

A. No.

Q. Okay. Are there any other, like, alleyways or anything else that --

A. Yes.

Q. Okay. And where are the -- where do you normally find the alleyways?

A. Between those buildings.

Q. Between the houses?

A. Yes.

Q. Okay. And have you seen people drive down the alleyways?

A. Yeah. People that -- sometime they come on West Hollis Street (phonetic), they'll cut through to get back on Ash Street. If they pass it, they'll cut through that way.

Q. Okay. So it's not unusual for people to drive on them?

A. Oh, no. No.

Q. How about walking?

A. No. People cut -- that's the shortcut from West Hollis to Ash Street because it brings you halfway up Ash Street.

Q. Okay. And that's the alley that you were found in that night?

A. Yes, ma'am.

[207] Q. Okay. And that's -- is that open to the public?

A. Yes.

Q. Okay. It's not -- there are no gates or anything, are there?

A. No. Sometimes people hang out back there.

Q. I want to talk specifically about the alleyway connecting West Hollis Street and Ash Street, okay?

A. Yeah.

Q. Was that -- have you gone down that alleyway before?

A. Yes.

Q. Okay. And how many times have you gone down that alleyway?

A. I've been in New Hampshire nineteen years. There's no counting. Numerous times. Numerous times.

Q. Okay.

A. And -- because that's -- I grew up around the tree streets. I've hung out there the whole time here.

Q. Okay. And is it unusual to see garbage in that alleyway?

A. No. There's usually electronics. Like, you can go -- you can go down West Hollis Street any given day and you see electronics there, and people don't -- just throw -- you see computer monitors, house stereo, house entertainment centers just [208] sitting out there. They just -- whoever lives in that building threw it out there.

Q. In that specific alley?

A. In that specific alley. The people that live in that big building.

Q. Okay. I want to talk about the night that you were arrested, okay? August 14th into 15th. Do you remember that night?

A. Yes.

Q. Okay. Where were you going that night as you were cutting through the alleyway?

A. I was going back to my truck, which was at 92 Ash Street. I thought it was 30 -- it was 92 Ash Street.

Q. Okay.

A. It's a gray building with red trimming on the windows. It was my cousin Buddy's house.

Q. Okay. And you were -- were you on your bike or -- how were you getting there?

A. I walked from Willow Street, which is my friend Smokey's house. Like I said, I have friends with nicknames, and his real name is Hector. I was at his house. And I was there for a good probably same -- two hours, because I -- you know, I'm just hanging out with my friends. And that's why -- until it got a [209] little later, and I was going to go back to my truck, check on my truck before I went home.

Q. Okay. So why were you going down the alleyway?

A. So, for one, I just had -- it brings me halfway up Ash Street, you know, and it's right before Ash. I just cut through there and go to my vehicle, because where I come out at, like, is right at the corner where my cousin's house is, the half where my cousin's house is at.

Q. Okay. So it's fair to say you were taking a shortcut?

A. A shortcut, yes.

Q. Okay. Did you see anyone else ahead of you in the alleyway?

A. Well, when I came off Pine Street and turned onto West Hollis, I seen three individuals take the same shortcut that I was taking -- that I took.

Q. Okay. Do you want to show the --

A. Yes.

Q. -- show the jury on the map?

A. Yes. May I, Your Honor?

THE COURT: Yes, absolutely.

(Witness steps down from stand to easel.)

(Witness away from microphone.)

BY MS. KOWALEWSKI:

[210] Q. Okay. So where were you starting? Were you starting -- where were you starting your journey from that night?

(Counsel and witness confer.)

BY MS. KOWALEWSKI:

Q. Okay. Where were you starting from that night?

A. Okay. This is -- this is Central Street, Pine Street.

Q. Okay. Draw -- make sure you draw the whole street.

A. Okay.

Q. So where were you --

A. I was going down -- this is Hollow Street right here, Central Street, okay?

Q. Mark it Central Street, please. Okay.

A. And this is --

Q. What's this street up here?

A. This would be Pine.

Q. Okay. Will you mark that, please? Okay.

A. This is Willow. I was right here on the corner.

Q. Okay.

A. This is my friend -- this would be --

Q. Can you mark it as Willow, please? Okay.

And where were you -- can you mark where you were going to?

A. Like -- okay. This -- okay, right -- I have to draw a [211] whole new street.

Q. Okay. Can you fit it up here?

A. Yeah.

Q. Okay.

A. This would be West Hollis Street, this and --

Q. Okay. Can you --

A. That's West Hollis Street.

Q. Okay. Mark that as West Hollis Street. Okay.

A. All right. I came out West Hollis.

Q. Can you mark --

A. I came out West Hollis, turned down Pine --

Q. Okay.

A. -- cut across the bike trail, across the bike trail and then Pine goes -- the bike trail cuts all the way to Palm Street.

Q. Okay.

A. Okay. I cut across Palm Street and over to West Hollis.

Q. West Hollis is over here, though?

A. Yeah. Well, I had to -- I don't have room. I mean, there's -- for drawing maps, so --

Q. Okay. So let's look at this --

A. Yeah. It may be a little easier.

Q. Okay. So here's Pine Street.

A. Here's Pine Street.

[212] Q. Don't mark it, though. Where on Pine Street were you?

A. If this is Central, this is Willow Street. That's why I drew my own map because I'm not familiar with the way --

Q. Okay.

A. This -- okay, yes.

Q. Don't mark it. Don't mark it. So where were you --

A. I came from here.

MS. LA FRANCE: Your Honor, may we approach?

THE COURT: Sure.

MS. LA FRANCE: Well, it might be easier if we could get a different color pen for the record. Maybe a black pen?

THE COURT: Sure.

(Counsel confer.)

BY MS. KOWALEWSKI:

Q. So where were you? Where did you start?

A. I started here, right here on the corner, directly on the corner of Willow.

Q. Okay.

A. I came down -- I came down Central, turned down Pine. This would be Pine -- this would be Palm Street.

Q. Palm Street would be right here?

A. Yes. Where you can almost see through the --

Q. Okay. So Palm Street is -- just to make sure the record [213] is clear, Palm Street is parallel -- it runs parallel to Pine Street?

A. Pine Street, yes.

Q. Okay.

A. And there is a bike trail that cuts straight across all the streets all the way down to City Hall. And it also runs all the way out to Mine Falls.

Q. And that's the bike path?

A. That's the bike path. So I can draw it. You want me to draw it?

MS. KOWALEWSKI: Do you have any objection?

MS. LA FRANCE: No.

THE WITNESS: This would be a bike trail, this whole -- it cuts across all these streets. There's a stop sign with a crosswalk for people on bicycles and walking.

BY MS. KOWALEWSKI:

Q. Okay. So draw your path.

A. I came from this way walking over to the bike trails, and this would be Palm.

Q. Okay.

A. All right? I cut down over to West Hollis. Now, as I'm right here, you can see the two individuals. This is Jax Market. This would be a variety store.

[214] Q. Okay. So as you're at the -- almost at the corner of West Hollis, you see three individuals?

A. Three individuals.

Q. And where are they in relation to you?

A. Where are they? Well, they're right -- they just kind of -- they're over here. They're not right here. Right at the beginning of this, so this shortcut.

Q. So you're at the corner, and they're at the beginning of the alleyway?

A. Yes. And there's three of them, two being dark complected and one of them lighter. I don't know if it was white or Hispanic, but he was lighter than the other two.

Q. Okay.

A. And the brother of one was on a bicycle.

Q. What color was the bike?

A. It was a -- it looked like a -- like a mountain bike ten-speed or something. I'm too far away to tell exactly what color. It's dark out. I don't know exactly what color. But it's not the color of my bike.

Q. Okay.

A. Mine is a darker color.

Q. Okay. So do you -- do they enter the alleyway before you?

[215] A. Yes.

Q. Okay. And what do you do?

A. By the time I get to the store, they're already out of vision. They're already out of vision by the time I get to where the store is, and I --

Q. Where is the store?

A. It would be about right here.

Q. Okay. So by the time you get there --

A. Right in the store.

Q. -- you can't see them anymore?

A. No.

Q. Okay.

A. So then I cut through the path, because the path goes there and curves out just like this. This is what the path looks like.

Q. Okay.

A. This is a parking lot. And this is -- the rest of the way out to Ash Street. It brings you right out to Ash. And then you continue on up to Kinsley, Lake.

Q. Okay. Have a seat, please.

(Witness resumes stand.)

BY MS. KOWALEWSKI:

Q. What did you -- do you see anything odd in the alleyway [216] when you got there?

A. At first -- when I first came into the trail, when I first came into the alleyway, after I passed the -- where the normal trash and everything is, as you go further to the parking lot there -- when you first see it, you can't tell whether -- I'm thinking it's just a -- part of trash.

Q. Okay.

A. So as I'm walking up, I keep minding my business, going the same paths, and I come -- I approach it. It was these two. When you first look at it, it looks like the Nike shoe box that's red on top and black on the bottom. I --

Q. So you saw these?

A. Yes.

Q. The amps?

A. That red one was on top of the black one.

Q. It looked exactly like -- like this?

A. And when -- yeah. When you look at it was like kata-corner. It was kata-corner basically, okay? So --

Q. Okay. Where were they located?

A. Can I show on there so that way it gives the jury an idea?

Q. Sure, if you want, you can –

(Witness steps down from stand.)

[217] (Witness away from microphone.)

THE WITNESS: On this path -- on this path here, these are the -- as soon as you come in, these are car -- these are the garages right here for the tenants of 72 1/2 -- or 17 1/2 West Hollis.

BY MS. KOWALEWSKI:

Q. Now, when you say garage, you mean parking lot, right?

A. There's a parking lot right here. These are the cars being parked here. But then the garages to these -- to these apartments is right here. These are their garages. And they're the drainage right in here. These things were right in front of the drainage.

Q. When you say drainage, what do you mean?

A. Like, a regular drain, but it dips down. The sewer drips down there.

Q. Okay.

A. And there's where -- like, if someone wants to back out, they could -- they run it over, or if somebody's coming through, they -- you definitely know you hit something.

Q. So they're in the middle of the alleyway?

A. Yes. There's a -- like if somebody like -- somebody just dropped them. That's why I thought it was a book.

Q. Okay.

[218] A. I mean, not a book. I mean a box.

Q. Okay.

A. And when I approached it, I noticed what it -- I noticed what it was because I do systems. I didn't notice what the hell it was, and all I did was pick it up. And before I got to move anything -- there was an officer behind me.

Q. Okay. Had you seen these speakers at any time that night?

A. No. Yesterday is my first time seeing that thing.

Q. Okay.

A. And like I said, that's --

Q. Have a seat.

(Witness resumes stand.)

BY MS. KOWALEWSKI:

Q. So when the officer showed up, what did she tell you to do?

A. When -- well, first, I never got there -- I was never given the opportunity to --

Q. What did she tell you to do?

A. She said, hey, what are you doing.

Q. And what did you do?

A. I said, I'm putting these down, ma'am, and I asked her what the problem was. And she asked -- she first approached me [219] like I was a witness, not a suspect. And she asked me if I seen anybody coming in the area or coming through there. And I stated what I seen, same thing I told you just now what I seen. And I explained that to the officer. So we walked to where the path comes out.

Q. Okay.

(Witness steps down from stand.)

(Witness away from microphone.)

THE WITNESS: Me and this officer, she approached me here, right before the edge. She approached me right here. And --

BY MS. KOWALEWSKI:

Q. So she approached you right there?

A. Right where I picked them up, right -- just under -- I never got the opportunity to do anything with them. And she asked me what I was doing. I explained to her what I was doing. And that's when she asked me, of course, had I seen anybody, and I say -- and I told her what I seen, and she walked with me. Me and her both walked over to the edge, and she seen one of the individuals.

Q. You saw somebody there?

A. Yes. And she asked me -- she asked me, is that one of the people you seen coming through here, and I stated yes.

[220] Q. Okay.

A. And the other two that -- wasn't with him.

Q. Okay.

A. And I explained to her that there was other individuals, too.

Q. Okay.

A. And she went over to him, and she pulled him over and spoke to her (sic) and left me there, told me to wait there, so that way we're not together and she can hear what's going on.

Q. Okay.

A. She didn't have us together. She took him over there to the garage door and was speaking to him, when I was over here.

Q. Okay. And at some point, did she come back and talk to you?

A. She told him to come back over, and then she could talk to both of us and then disappeared. She went back towards the other direction, back over here.

Q. Okay. At some point, were you arrested?

A. I was arrested. First of all, she had me standing with another officer around this corner. I was standing with Officer -- around this corner here.

Q. Okay.

A. Out of view of everything that was going on with the [221] vehicles.

(Witness resumes stand.)

BY MS. KOWALEWSKI:

Q. Okay. But while you were -- did you at any point see what car had been broken into?

A. No. No. No.

Q. Okay. At some point, were you arrested?

A. I was arrested after I heard someone coming out yelling, and I heard the officer telling the people to calm down and drop the baseball bat, drop the bat and calm down. And I can hear is -- my bleep is gone, somebody broke into my bleep, you know, and I don't want to swear and put it on the record, but -- and I was speaking with Officer Dunn (phonetic) while this was going on. And Officer --

Q. Okay. So you -- what -- do you remember -- so you got arrested. When I say "got arrested," what happened to you that led you to believe that you had gotten arrested?

A. Well, Officer Sizek (phonetic) came up to me and he asked me what happened and what was going on, and I told him what I did. And he told me to put my hands behind my back, and he was arresting me for receiving stolen property. And at that point, I was -- I was asking questions. I wasn't resisting, but I wasn't understanding what the hell was going on at the same time.

[222] Q. Okay. Why didn't you understand what was going on?

A. Because I honestly was just trying to move something out of the way so somebody don't run it over or -- I was just trying to be a good Samaritan and move something, really.

Q. Okay.

A. I know if it was my house and someone had seen something in the way and I ran it over, I would expect that who -- if somebody had seen it they could have moved it. You know what I mean?

Q. Right.

A. Whatever.

Q. Do you remember talking to Detective Phelps at the police department?

A. Yes, ma'am.

Q. Okay. And you heard -- you heard her testimony today, right?

A. Yes, ma'am.

Q. And do you remember the context of your conversations with her?

A. Yes, ma'am.

Q. What did you tell her happened?

A. I told Officer Phelps the same thing that I told Officer Clay when she initially came up to me and asked me what I was [223] doing.

Q. Okay. Now, you heard Officer Phelps also talk about how she interpreted your statement that you had driven -- you had rode your bike all the way to your mom's house?

A. Yeah.

Q. Was that an incorrect assumption?

A. Yes.

Q. Okay. Did she clarify anything with you about what had happened to your bike while you were on your way to your mom's house in that first interview?

A. She asked me what happened to my bicycle when -- because I didn't get arrested with a bicycle. And I told her, my bike -- I told the officer what happened with my bicycle. And I also told her that she can go and look if she wants and look in the bush. I told her what the house looked like. I described the whole driveway where my bike was. And I explained to her what bush it was in. So if she wanted to go and double check -- cross reference it, she would see my bike still there with a blown back tire. And the only reason I didn't -- I couldn't take my back tire off because my wrench was for the front tire. My back tire, I need socket wrenches because my bolts are inside the pads. It was a trick bike.

Q. Okay.

[224] A. And then when I tried to explain that to her, she jumped to -- she started talking about what was going on at the parking lot, what happened, started telling me what other people were saying different, and everything. And it was just -- it was like a back-and-forth thing with us

Q. Okay. Do you want to come down for a second? I just have a couple more questions.

(Witness steps down from stand.)

(Witness away from microphone.)

BY MS. KOWALEWSKI:

Q. Barion, how tall are you?

A. I'm six foot two.

Q. How much do you weigh?

A. About -- probably about 170 now, but I was around 178 then.

Q. Okay. Did you have any cuts on your hands or on your arms that night?

A. No.

Q. Okay. Did you go to the hospital for anything that night?

A. No, ma'am.

Q. Okay. Thank you.

MS. KOWALEWSKI: I have no further questions, Your [225] [Perry – Cross] Honor.

THE COURT: All right.

MS. KOWALEWSKI: Have a seat. Attorney LaFrance may have some questions for you.

(Witness resumes stand.)

CROSS-EXAMINATION BY MS. LA FRANCE:

Q. Good morning, Mr. Perry.

Mr. Perry, you are asking this jury to believe that you just happened to find this amplifier -- these amplifiers and these speakers in the middle of a parking lot in the middle of the night?

A. I'm just stating the truth.

Q. Okay. And you have several prior felony convictions, right?

A. Yes.

Q. Okay. You have a burglary conviction in 2007?

A. Okay.

Q. Right? You have two theft convictions?

A. Yes.

Q. Right? One from 2001?

A. Yes.

Q. And these are all felony level convictions?

A. Yes.

[226] Q. And you have another theft conviction, I believe, from the same time, 2007?

A. Excuse me?

Q. You have another -- you have two theft convictions.

A. Yes.

Q. Felony theft convictions?

A. Yes.

Q. From 2001, and I believe it's 2007.

A. I don't believe there's a theft in 2007.

Q. Okay. It was a -- there was burglary in 2007.

A. 2007.

Q. Okay. And there was another burglary back in 1999?

A. Yes.

Q. Okay. But you admit that you have four felony convictions on your record?

A. Yes. I never denied my -- I never once denied my past. I never denied my past. I did my time for those, too. I did -- I did my time for that.

Q. Okay.

THE COURT: Ladies and gentlemen, let me instruct you at this point that the only purpose for which you may consider the prior convictions of the defendant as he's just indicated in his testimony is on the issue of his credibility. In other [227] words, you may consider that for such value as you think it has, and that's how -- what, if any, value it has is entirely up to you -- on the issue of the defendant's credibility, that is, how you assess what he is telling you.

It's very important that I instruct you that you cannot use his prior convictions as some kind of substantive evidence. In other words, if you say to yourself, well, you know, he's been convicted of these kind of things before, so he must have done it this time, that would be improper and would be a violation of your sworn oath as jurors. Okay? The defendant is not on trial for any prior events in his life. He's on trial only for the charges that the State has brought against him on this occasion related to August 15th, 2008.

So you may consider in evaluating his credibility the fact that he has these prior convictions for such value

as you think it has. You may think it has some value on the issue of his credibility; you may think it doesn't. But you cannot use it to say, you know, he's -- he must generally be a bad person and, therefore, you know, if you did some other crimes in the past he must have done this one. All right?

MS. LA FRANCE: Thank you, Your Honor.

THE WITNESS: I would like to clear something up about that.

[228] THE COURT: There's no question pending.

THE WITNESS: Okay.

THE COURT: Your counsel will have an opportunity for redirect.

THE WITNESS: Oh.

BY MS. LA FRANCE:

Q. Mr. Perry, you said it's kind of a hobby of yours to fix cars up?

A. Yes. I want

Q. You went -- I'm sorry, go ahead.

A. Did you finish your question?

Q. Yeah. It's a hobby of yours to fix cars up?

A. Yes. I went to school to -- as an auto mechanic, and I started doing my own car systems because some of them almost blew my amp originally. That's what got me into fixing my own car systems and stuff, and I also fix other people's for them.

Q. Okay. So you are familiar with where a person would keep a big speaker in his car?

A. Because that's -- well, myself, that's where I place my speakers. That's where usually people place their speakers is in the trunk of a vehicle.

Q. You know that people will keep their speakers in their trunk?

[229] A. Excuse me?

Q. Right? You're aware, because you work with these systems --

A. Yes. Yes.

Q. -- you're aware that people generally keep speakers in their trunk?

A. Yes. It's just common knowledge, basically.

Q. Okay. And you also said, well, you recognized what was on the ground because you work with these systems?

A. Yeah. When I got -- when I approached it, when I got close on it, I realized what the hell it really was,

because when you first come up on it, it just looks like a box with its lid off because they were kata-cornered. But then when you come up on it, you can tell it's not a shoe box and that it's actually metal. You come up on it, you can tell what the hell it is when you come up on it.

Q. And when -- now, I don't know anything about really a lot of -- I know how to put the CD in my car and turn my radio on. When you turn the speakers on, there's some kind of control on the dashboard to turn these speakers on and the amplifiers?

A. Okay. I'm not understanding you now.

Q. Generally, if a person has the system in their car, every time they want to turn the sound up or turn it down, they [230] don't have to get out of their car, open up the trunk, and adjust the volume or something, right?

A. No.

Q. Generally, the controls would be --

A. On your stereo.

Q. -- somewhere on the steering wheel, or the dashboard, or somewhere within their arm's reach so they can maybe as you heard Alex testify yesterday, right, he said he got --

MS. LA FRANCE: May I approach, Your Honor?

THE COURT: Yes.

BY MS. LA FRANCE:

Q. -- these two amplifiers that you had in your possession, one was for voice, I think, and one -- the other was for a sub-woofer. Is that --

A. I don't -- they both were for sub-woofers. I don't understand the difference between the two. They're both for the same thing. They both serve the same purpose.

Q. Okay. But he had -- he did have two of them in his car?

A. That I don't know. I don't know about his car. I didn't -- I don't know what his -- I didn't see his vehicle. I don't know what his vehicle even looks like.

Q. But what I'm saying is the controls would be within arm's reach of the driver.

[231] A. All right.

Q. Okay. So if somebody wanted to see if somebody had some nice speakers, they would have to peek in the window of somebody's car to see if those controls were on the dashboard or within their reach, right?

A. No.

Q. No? You can --

A. No.

Q. -- you can tell just by looking at the car that there are speakers in the car?

A. You wouldn't know unless you opened somebody's trunk to know if they're there.

Q. Okay. But you just testified that the controls for them are somewhere within the driver's reach.

A. No. I testified that it's on the stereo. A stereo turns your volume up and down. But as far as where amps and system, you don't know unless you open the trunk or you've seen their -- that they have that. That's the only way you know.

Q. Okay. And you testified earlier that you're familiar with the tree streets area?

A. Yes.

Q. And you know a lot of people in that area?

A. Yes.

[232] Q. You hang around there all the time?

A. I grew up around there.

Q. Okay. And Alex lived in that area?

A. I don't know Alex.

Q. Okay. But, again, he lived in that same area as you did?

A. I don't live in the tree streets. I grew up around there.

Q. Okay. But, again, you said you were familiar with people from that area?

A. Yes.

Q. And as a matter of fact, that night, you thought you might have saw three of your buddies walking through the alleyway.

A. I know one of them was Riley and his brother. I don't know the other guy that was with them.

Q. Okay. Riley; is he African American like yourself?

A. Yes. He's a black and Hispanic.

Q. Okay. He is black and Hispanic?

A. Yes.

Q. Okay. So he's a little bit lighter skinned than you?

A. No.

Q. No? He's as dark as you are?

[233] A. Yes.

Q. Okay. So if Officer Clay put in her report that he was Hispanic, that would be wrong?

A. She -- the only reason she put that in her report is because she spoke to him and asked him what he -- that's how -- and she knew his name. It's a Hispanic name.

Q. Okay. And you would agree with me that these two speakers in this case, they're pretty heavy, right?

A. Yeah. But I didn't pick them up.

Q. Okay.

A. So I wouldn't know.

Q. You can hear them kind of pound on the ground --

A. Yeah.

Q. It appears they would be heavy. They're surrounded by --

A. I see how big -- yes, they are pretty big speakers, yes.

Q. Okay. So you would agree that if somebody had something heavy like that in their trunk, it might weigh down the trunk a little bit as well?

A. Excuse me? Come again?

Q. If somebody has something heavy in their trunk. it tends to weigh the trunk down.

A. Probably.

[234] Q. Okay. So a person like yourself who is knowledgeable about these systems might actually be able to tell if somebody had a substantial speaker system in their trunk because of the weight of the trunk?

A. No. No.

Q. No?

A. That is not correct.

Q. But you went to school for this, but you wouldn' be able to tell --

A. I went to school for auto mechanics, not to instal systems.

Q. Okay. But you said you do the systems now?

A. I do my own systems, yes.

Q. Okay. And you're saying that --

A. And I do other people's if they ask me to.

Q. Okay. Now let's talk about these buddies of yours that you saw that night. You testified that you were coming from Willow Street, you had come out onto West Hollis?

A. Yes.

Q. And kind of across the street you see three people who you think are your buddies?

A. I know -- I recognize Riley and his brother. I don't know the other guy that was with them.

[235] Q. Okay. And you told Detective Phelps you saw them, they were zipping through the alley?

A. Yes.

Q. Okay. So when you saw them, they weren't yet in the parking lot?

A. They were already into the path.

Q. Okay. And they were cutting through?

A. Yes.

Q. All right. And you kind of followed them through, right?

A. When I got over there, they weren't there no more.

Q. Okay. But you would say -- so, generally, when you were crossing from Pine Street to West Hollis, about how long did it take you?

A. Five -- probably about three -- between three and five -- three and five minutes.

Q. Three? It took you --

A. I'm just walking. I'm not running, you know. I mean, I'm just taking my time.

Q. Okay.

A. I'm walking alone.

Q. And you saw your friends --

A. Going through the same way.

[236] Q. -- across the street? Okay. And they weren't stopped or anything?

A. No. They were going about their business.

Q. They were walking right through?

A. They were together minding their business, and I was walking along minding mine.

Q. Okay. And you testified earlier that one of them was on a bike --

A. Yeah.

Q. -- and it was kind of a ten-speed bike?

A. It was like a -- it was a bigger bike than mine.

Q. Okay. And two of them were on foot?

A. Yes.

Q. Okay. That's not what you told Detective Phelps. You never mentioned one of them was on a bike, correct?

A. Detective Phelps never asked me if one of them was on a bicycle.

Q. Okay.

A. I just said -- I didn't know that a bicycle was involved until now.

Q. All right. Well, let's talk about that. You didn't know a bicycle was involved until now, until today?

A. Yeah, until yesterday.

[237] Q. All right. You had no idea that there was a bicycle involved?

A. No. I'm debating, like -- Detective Phillip (sic), she never insinuated that, like, I was -- it was for my bike to be involved, basically, like where I -- how I rode from my

house and everything. She never insinuated that that was how -- putting it towards the crime.

Q. Okay. But you're telling this jury that until today, until this trial started, you had no idea that there was a bike in the area?

A. No. I didn't know there was a bike in the area.

Q. Okay. Mr. Perry, the State provided you with all sorts of discovery, what's called discovery in this matter, right?

A. Yes.

MS. KOWALEWSKI: Your Honor, may we approach?

THE COURT: Sure.

(At sidebar.)

MS. KOWALEWSKI: The State provided me with discovery –

THE COURT: And you're his agent. That's a fair question.

MS. KOWALEWSKI: Okay.

THE COURT: That's a fair question. Overruled.

[238] MS. KOWALEWSKI: Thank you.

(Sidebar concluded.)

BY MS. LA FRANCE:

Q. And, Mr. Perry, the State provided you with a couple hundred pages of discovery in this matter --

A. I noticed that in my discovery that I got, I didn't have my statement with Detective Phillips.

Q. Yes. But you --

A. That wasn't in my discovery.

Q. But you reviewed this discovery with your attorney at some point?

A. Not with the statements, no.

Q. Okay. But you reviewed Officer Clay's report?

A. Yes.

Q. All right. You saw the pictures that the State provided?

A. No.

Q. No? You never saw the pictures?

A. I looked at them yesterday. I seen the pictures yesterday.

Q. Okay. So you're -- what you're saying is the hundreds of pages of discovery that the State sent to you. you didn't see it all?

[239] A. No.

Q. Okay. And -- but in that report -- did you read Officer Clay's report?

A. Yes.

Q. Okay. And you read the statements from the witnesses against you, right?

A. Yes.

Q. Okay. So you were aware that they had mentioned there was a bicycle?

A. Oh, yes. Yes.

Q. Okay.

A. Yes, ma'am.

Q. So you were incorrect before?

A. Yes, yes. My --

Q. You do remember a bicycle?

A. -- yes, I am -- I'm sorry about that, yes. I am incorrect. Yes, ma'am.

Q. All right.

A. This is back in -- I read my discovery when -- in the beginning of the case, in the way beginning.

Q. Okay. So you see these three individuals.

A. Yes.

Q. Now, one of them is now on a bike?

[240] A. Yes.

Q. As you say. But you didn't tell that to Detective Phelps?

A. No. I didn't tell anybody -- in an initial interview with Detective Phillips, I knew nothing about a bike being involved. That's what I meant.

Q. Okay.

A. When she came --

Q. So now that you know there was --

A. -- when she came to interview me, I didn't know a bicycle was mentioned at all.

Q. Right. Okay. And --

A. And she never asked me that, what the people was riding or walking. They didn't ask me that.

Q. Okay. And now that you know there's a bicycle involved, now you're saying one of the guys you saw was on a bicycle?

A. Well, that's because it's the truth.

Q. Okay.

A. And if she would have asked me that, I would have told her. She never got into detail about the other people. She just asked me who did I see, and I told her what I seen.

Q. You said -- you told her who you saw, and you told her -- you basically told her who you had seen?

[241] A. Yep.

Q. And you didn't think it was important to mention one of them was on a bike?

A. She didn't ask me nothing like that. It's just -- it was a brief discussion. If you read on the statements, you'll see what I'm talking about.

Q. Okay.

A. Because --

Q. Well, I have read the statements.

A. Yes. Because me and her was going back and forth, so I really didn't get a chance to stay on one subject either because she was busy coming at me, that -- pointing and saying that I'm doing something. You see what I mean? So I'm --

Q. Well, she's asking you what happened on that day. Right? And you tell her you saw three guys --

A. Yep. I told her the same thing I told you today.

Q. And you said -- and as a matter of fact, you -- at one point, you told her that they zipped through that area.

A. Yes.

Q. And you never saw them pause?

A. No.

Q. Never saw them looking in cars?

A. I wasn't on the -- I wasn't back there with them.

[242] Q. Okay. You never saw them circling the area on the bike?

A. I wasn't back there with them.

Q. Okay. But you said you saw them when you were crossing the street?

A. Crossing -- yeah. They were -- by the time I got across the street, they were already through that alleyway.

Q. Okay. And they walked right through, right?

A. Yeah. They was already to the alleyway. I wasn't walking with them.

Q. Okay. And you heard -- you heard Nubia and Joffre testify yesterday?

A. Yes.

Q. You heard them say that they never saw three individuals?

A. Actually, Nubia said, "they." She went over to Alex Clavijo's apartment, knocked on the door, and said "they" arrived with you. So she did say "they." She didn't say "he."

Q. But on the stand --

A. She didn't --

Q. -- on the stand, she said --

A. On the stand, she said "they," not, "he." And if you go back into the report, you'll hear her saying numerous times "they." Even -- even her husband said "they," not, "he."

[243] Q. Okay. Her husband Joffre only saw you in the parking lot?

A. Yeah. But when he discussed, well, was somebody going into something, he said, "they," not "the" -- not "he."

Q. That's your recollection. We'll let the jury remember what they remember.

Now, you said in direct that you carried around a couple of tools on your person?

A. Yes, ma'am.

Q. Okay. You had an Allen wrench and the vise grip?

A. Yep. My vise grip, when I was originally started to ride my bike it was clamped to my seat post.

Q. Okay. And the Allen wrench you said was an L-shaped --

A. Yeah.

Q. Now, it doesn't have any mechanical things on it, right? An Allen wrench is just -- it's one forged -- if I know my tools and I don't, but it's just one L-shaped continuous piece of metal?

A. Yep. It can fix my handlebar and my bike seat.

Q. Okay. And you heard Officer Clay testify that she didn't find any other tools on you?

A. Well, I was -- Officer Sizek is the one that took them out of my pocket when I was arrested. He picked up my Allen [244] wrench and my -- and my vise grip.

Q. Okay. But she's testified the only tool she found was the vise grip.

A. I had an Allen wrench, too.

Q. Okay. And you heard Officer Clay testify as to why she performs a pat-frisk, to find any items such as this?

A. It wasn't Officer Clay that did the pat-frisk. It was Officer Sizek.

Q. Okay.

A. And Officer Sizek was the one that found the wrench and the vise grip. It was Officer Sizek, not Officer Clay.

Q. Officer who?

A. Officer Sizek, not Officer Clay.

Q. So when Officer --

A. Officer Sizek handed over everything after he cuffed me.

Q. When Officer Clay testified that she pat-frisked you and she found the wrench, she's lying?

A. Yes. And I mentioned that to my attorney.

Q. Okay. Thank you.

MS. KOWALEWSKI: I have no further questions.

THE COURT: All right. Any redirect?

MS. KOWALEWSKI: No, thank you.

THE COURT: All right. Thank you very much, sir. You [245] may step down.

(Witness excused.)

MS. KOWALEWSKI: Defense rests, Your Honor.

THE COURT: All right. Any rebuttal?

MS. LA FRANCE: May we approach, Your Honor?

THE COURT: Yep.

(At sidebar.)

MS. LA FRANCE: I guess I -- before we do closings, now he just came out with a different officer arrested him. I don't really have any chance to rebut this because --

THE COURT: Well, how --

MS. LA FRANCE: Well, you know, I don't --

THE COURT: It just -- who is the --

MS. KOWALEWSKI: It's Officer Scott Sizek. I don't know how long he's been with the --

MS. LA FRANCE: Yeah. Yeah, I know Officer Scott Sizek. He wasn't mentioned in the reports at all. So --

THE COURT: You can call him if you want.

MS. LA FRANCE: I don't think I will. The only thing I wanted to ask, and I don't know how we address this, but she made -- Attorney Kowalewski made a big point of asking him if he had any cuts on his hands or anything. And I would ask that she be prohibited at closing from arguing that because, to me, that's [246] opening up the fact that he's a burglar. I mean, he has two burglary convictions; he has two theft convictions.

THE COURT: So what -- I'm sorry. What does that --

MS. LA FRANCE: That he would know how to get in someplace without necessarily -- he's got the expertise, so to speak. He's a burglar and he's a thief, so he would know how to get into a car without injuring himself.

THE COURT: Well, I mean, what -- well, that -- I got you on that. But, I mean, what -- you know, the fact that he didn't cut himself breaking in, how does -- you know, I mean, that's an argument, I suppose. But I don't see how that's particularly powerful. I mean, he could --

MS. LA FRANCE: No, no, I know that. But it gives --

MS. KOWALEWSKI: It is an argument --

THE COURT: Yes, sure.

MS. KOWALEWSKI: -- because I guess my position is that the State's saying that this window was shattered and that was why I was going down the lines of cuts, et cetera, especially if they're going to -- I'm objecting. I don't think I should be barred from making that argument.

THE COURT: No, you're not barred from that.

MS. LA FRANCE: Then I would ask that the State be allowed to just remind the jury that he is a convicted burglar [247] and a thief and he -- you know, he has this background that he knows how to -- I think the inference could be made that he would know how to --

MS. KOWALEWSKI: I think that's an improper inference because the --

THE COURT: Well, I guess it depends on what -- I guess it depends on what you say. I mean, if -- you know, if -- I guess I'll just wait and see, and I'll just ask you to come to the bench before you --

MS. LA FRANCE: I will.

THE COURT: The other thing is while I have you at the bench, I just want to -- I mean, this whole thing came up so quickly about the defendant deciding to testify.

I had no anticipation of that, and it sounds like maybe the State and defense counsel didn't, either.

But I would just say pursuant to Rule 609-A:1, I permitted the State to cross-examine the defendant on his prior convictions because I find that the probative value of admitting that evidence on the issue of the defendant's credibility outweighs his prejudice -- prejudicial effect to him in this case. I mean, this is clearly a case of where the issue of the defendant's credibility is, you know, exceedingly important. And it seems to me that it was entirely appropriate for the jury to [248] have, you know, in evaluating his credibility to be aware of his prior convictions. And so for that reason, I allowed it to be admitted, and that's the explanation of my reasons for doing that.

I would also note that there was really no objection to that, and I think -- well, there was no objection. It seems to me pretty clear that it should have been admitted.

All right. So what do you need, about five minutes to prepare for --

MS. KOWALEWSKI: Five, ten minutes.

THE COURT: -- to get ready for closings?

MS. LA FRANCE: Yeah.

THE COURT: All right. Then that --

MS. KOWALEWSKI: Thank you.

MS. LA FRANCE: Thank you.

(Sidebar concluded.)

THE COURT: All right. Ladies and gentlemen, the evidence in the case has been concluded. We'll be ready for closing argument in just a few minutes. But just to give the parties an opportunity to sort of get set up to do that, we'll take a brief recess now for about ten minutes or so. Please don't discuss the case during the recess, and we'll see you in about ten minutes.

[249] (Recess taken at 11:37 a.m.)

(Proceedings resume at 12:05 p.m.)

(Jury present in court.)

THE COURT: Ladies and gentlemen, the evidence in the case has been completed and we will now hear closing arguments from counsel for the parties. Because the State has the burden of proof in all criminal cases, the State will get to make the final argument to you.

So we'll hear first from Attorney Kowalewski. Attorney Kowalewski?

CLOSING ARGUMENT BY THE DEFENDANT

MS. KOWALEWSKI: Thank you.

You know, somebody denies the allegations consistently over and over and over again. And in the face of lies like these, in the face of an incomplete investigation, in the face of a wrong ID, a plea of not guilty, well, that's what this case is all about.

I want to talk to you -- this case is about being in the wrong place at the wrong time, the wrong charges. Let's talk about the IDs. Let's talk a little bit about Joffre. He's the one that picked Mr. Perry out of this lineup, this photo array. But there are some -- there are a few reasons why these are unreliable. The State never told you how long he had to view [250] [Closing Arguments] them that initial time, that first time. We know that he came back after this was all being done and Mr. Perry's in custody talking to police officers. Think about it. Police officers dressed in uniforms driving cruisers, carrying guns.

Those are powerful, powerful context clues, powerful, powerful clues. What's to say that he didn't think to himself at that point, well, that -- they're talking to him, it must have been him? What is to say that at that point he didn't make that determination? That point where Mr. Perry was talking to the police.

Let's talk about his wife Nubia. Sweet lady, did her best to come in and tell you what she saw. She wasn't able to tell you much about who she saw, though. She couldn't pick him out of a lineup, out of a photo array, that same photo array that Detective Phelps said that she selected pictures of people in order to get an accurate identification.

And what else did she say? That guy that was with the police officer, that's who was circling. Again, think about the context with the guns, the uniforms. Powerful, powerful context clues. The State didn't even have her say, do you see the guy that you saw in the parking lot here in court today. Never had her do that. Never.

She also said, at first I thought that was one of [251] Alex's friends. And you want to know something? In the context of everything, that makes sense. And that makes sense because that car was pretty quirky. You had to know about that car to be able to figure out how to get into it, and that there was an expensive stereo system in the back, because let's face it, that car was a piece of crap. Okay? Couldn't get out from the inside, there were no door handles; piece of crap. Why go through all that trouble unless you really knew that there was something in the back? You can't tell just by looking into the car. You can't tell.

It also seems like an awful lot of trouble to go through, to go into to break a window of a car, shatter a window of a car, climb through, pop the trunk, take a wrench, roll down a window, and then go through the trunk, if you don't know that's something in it. And you can't tell that something is in it just by looking in the car. Seems like an awful lot of work to do.

Pretty much the State is saying to you that what happened was Mr. Perry took a bat, bashed the window, climbed through the window, popped the trunk, and got out, and took the stereo system. A bat that was found in

the trunk of the car: We know that Mr. Perry didn't have anything when he was walking through the lot in his hands. We know that. And if that's not how he got into the car, who the hell cares if he has a wrench? [252] Who cares? Who cares? It's not relevant.

Can you stand up for a second? Six-two. Imagine fitting six-two through this window. Thank you.

Does that make sense? No. There's no forensic evidence at all in this case, no fingerprints. We don't even know if he had glass on his shoes. What about all this glass? There's got to be glass somewhere. We don't even know if he had glass on him, in his shoes, or anything. There are no fingerprints in -- from inside the car, from outside the car, from the trunk.

Now, the State questioned Mr. Perry about the bike and about why he didn't talk to these fellows about a bike. I think Ms. Nubia -- Ms. Nubia Blandon Castro said it well also in her direct: She never asked me the question. People that aren't police officers, attorneys like Attorney LaFrance and I, or judges like Chief Justice Lynn don't know the significance of facts like that. They just don't. And he was questioned the day -- hours after he was arrested. There was no way for him to know what the statement -- what the police knew, especially because they weren't exactly being honest with him.

Barion Perry was being a good Samaritan. He gets charged with a crime as a result of that. He was in the wrong place at the wrong time. He had no reason to steal those amps.

[253] Thank you.

THE COURT: Thank you, Ms. Kowalewski.

Ms. LaFrance?

CLOSING ARGUMENT BY THE STATE

MS. LA FRANCE: Thank you, Your Honor.

Good morning, ladies and gentlemen. I guess it's afternoon now. You heard the defense talk about and they kept reiterating, boy, how could a six-foot-two person fit through that window. Not once did you ever hear me say that happened. We don't know exactly what happened. But let's use our common sense because that's the best tool you as jurors have in order to decide the facts of this case and who you believe.

Here is a car. And what do we see in movies and television shows all the time? Do people break windows and climb through them? No. What do they do? They break a window and then they reach in and they unlock the door. That's how they get into cars and houses. That's what we see here. And Attorney Kowalewski made a big deal about Barion Perry had no cuts or anything on his arms. Well, no, this -- as you can tell, there's no window left. There was no window left to get cut on. It's all gone. He could have easily reached in and opened that door.

And then -- and this is -- again, I would submit to you, this is just a hypothesis. This is my argument to you

based [254] on the facts as we know them. Once he gets in the car and pops the trunk, because, remember, he works with these systems, right? He knows about them. He went to mechanics school. He knows about these systems. He recognized the amps when he was supposedly walking through the parking lot and saw them. He knows these systems. Those kind of speakers are heavy. It's logical that he, knowing these systems, would know that that was in there because of the weight of it. And, again, common sense and logic would tell you that a person who knows these systems would be able to look into a car and see that there was something rigged up going to the trunk, and he would be able to tell just by looking at the trunk that this -- as Attorney Kowalewski called it, I guess it was a shit box, there's no other way to describe it. It was -- Alex's car wasn't, you know, a Cadillac. It was this puny little Honda with that huge speaker system in it weighing it down. And, again, you can use your own common sense. You've seen people driving down the street with something heavy in their car. You know from experience. What do people tell you or a person in the wintertime? What are you supposed to put in your trunk? Something heavy. It weighs it down so you don't slide on the ice. It is noticeable that a puny little car like that, it would be noticeable if there was something heavy in the trunk, especially to somebody who knows these systems.

[255] And that's exactly what Nubia told you, and Alex -- I'm sorry, Joffre told you, that they saw this individual looking into cars. He was looking and he told you himself that he puts in these systems, he fixes up cars. He was looking for a little something extra to supplement

him. Why keep going to Cash Converters and pay for amps when you can just look through a parking lot and take one from Alex?

That, ladies and gentlemen, is what I submit to you what happened in this case. So how do we know that?

Well, first of all, again, you need to use your common sense, and also in using your common sense, this is really a case of connecting the dots. You saw the testimony -- you heard the testimony from the witnesses on the stand. You heard the testimony from Nubia and Joffre, really the two people who saw this as it was happening. You heard the testimony of Alex about -- essentially Alex, his purpose was just to tell you, that's my stuff there that was in my car, I certainly didn't give anybody permission to take it. So, really, Nubia and Joffre are the two people that you need to look at and think about their testimony and what they saw.

Nubia told you that she observed this man for a long time. Joffre told you that he saw him up in his house, and then when he went out, he essentially confronted him face-to-face, he [256] said, and then he tried to hide when he turned on his headlights. So think about that. When Attorney Kowalewski starts talking about, well, Nubia wasn't able to identify him in a photo lineup, and Attorney Kowalewski made a big deal of asking her and Detective Phelps, well, she wasn't able to tell you about scars or markings or piercings or anything like that. But how could she be able to tell? She never saw him face-to-face. She saw him up from her window. She was a long way away.

But what she did say, what she was clear about, and what I clarified on my questioning of her was, was the person you saw take that box out of Alex's car, was that the same person that was confronted by Officer Clay. She said yes. She watched it all happen. She watched it all go down, essentially.

And Officer Clay told you that when she got to that place, she confronted the defendant. He had Alex's amps in his hand. So, again, those dots. You need to connect the dots.

Now, when you're thinking about it, because, really, what this comes down to in a nutshell is who do you believe. The State presented several witnesses that talked about what they saw. Nubia and Joffre told you that they saw this individual. Joffre was later able to identify him because he's the one who saw him close up. He picked him out of a photo lineup. And he didn't say it was because he saw the defendant talking to the [257] police that night. He said, well, he pretty much came face-to-face to him. He didn't say it was because he saw them talking to the police and just assumed it was him. He's the one who got a good look at him. He was the one who was able to identify him a month later. He was the one who saw him. Nubia was the one who saw this person who she later pointed out as, from what Officer Clay told you, as the defendant. She's the one who said, I saw him, he was circling around looking into cars.

And, ladies and gentlemen, remember this: Never did Nubia or Joffre say that there were three individuals

in that parking lot that they saw. There was always one person that they saw. Nubia never said that there were three individuals. It was only one person.

So Nubia and Joffre tell you what they saw before Officer Clay arrived. Officer Clay told you what she saw. Another dot to connect. Officer Clay told you that when she -- first of all, she told you that the victim was able to describe the system and also the fact that he did have that quirky little car that he had to, you know, pry open the windows with a wrench and kind of reach out of an unlock the door or open the door from the outside.

What Officer Clay told you was she didn't find the wrench until she searched him. Now, remember, there's - [258] according to the defendant, he also had an Allen wrench on him. And according to his testimony, he wasn't even searched by Officer Clay. So think about it, ladies and gentlemen. Either Joffre, Nubia, and Officer Clay are all lying, or the defendant is. So who do you believe?

And the judge will give you instructions, and he'll tell you that you need to consider a number of things. A big thing to consider, because really this is what it's about, who to believe. Do you believe the defendant, or do you believe the State's witnesses and what they saw?

And when deciding who to believe, one of the biggest factors you need to consider is who has a motive to lie. Ladies and gentlemen, who has the biggest motive to lie in this case? Nubia and Joffre are up there. They happened to be up that night because Joffre was going

out of town. What motive do they have? What motive does Officer Clay have? Officer Clay is a police officer. Her job, as she's told you, you know, she goes around and responds. Her job is essentially to uphold the law. Is it logical that there's a person going around breaking into cars, that she's just going to pick the first guy she picks off the street? Or does she want to, as a police officer, find the person who's going around breaking into cars and taking these items? What's her motivation to lie?

[259] And what about the defendant? What motive does he have to lie? He's charged with it. He's charged with this crime. So I would submit to you, ladies and gentlemen, that the defendant, of all the persons who testified, has the greater motive -- greatest motive to lie.

And another thing you can consider, as Judge Lynn instructed you, when considering who to believe, you can consider their past. And that is his criminal record. You can consider that, and only that. And I stress that, and Judge Lynn had stressed that. You only consider the defendant's criminal history in determining whether you believe him or not. You can't consider it, the fact that he has committed these crimes, he must have committed this.

But you need to consider that. You need to consider that. And when debating and talking amongst yourselves who to believe, you can consider the fact that this is a man who has previously disregarded the law. That's something you can consider.

MS. KOWALEWSKI: Your Honor, can we approach?

THE COURT: Yeah. Sure.

(At sidebar.)

MS. KOWALEWSKI: We're getting kind of close to the 404(b) area.

[260] THE COURT: Well, no, I think she's phrasing it in terms of credibility. I mean, it's -- and I'm going to instruct them again. But I don't think she's -- I think she's raised it in terms of credibility.

MS. KOWALEWSKI: Okay. I understand. Thank you, Judge.

THE COURT: All right.

(Sidebar concluded.)

MS. LA FRANCE: So, again, when you're debating amongst yourselves and talking amongst yourselves about who to believe, that is something you can consider.

And, also, I want to talk to you, you're going to hear the jury instructions. You will have his taped statement. It is redacted. It has some items missing from it. But, essentially, everything he told Detective Phelps is there regarding this incident. A couple of other things:

When he testified, all of a sudden, this bike appeared. Well, when he talked to Detective Phelps, he didn't mention a bike.

Your Honor?

THE COURT: Yeah.

(At sidebar.)

MS. LA FRANCE: I would ask you to instruct. That is [261] extremely prejudicial to the State. Somebody's crying back there, Your Honor, and I believe it's one of the defendant's -- it's somebody's --

MS. KOWALEWSKI: It's -- the defendant. He's --

MS. LA FRANCE: I'm sorry, Your Honor. That is extremely prejudicial to the State during their closing.

THE COURT: Well, I mean --

MS. LA FRANCE: Well, Your Honor --

THE COURT: Tell me -- give me a --

MS. LA FRANCE: Your Honor, I would ask that -- well, I would ask that the Court order him to stop and that they're not to consider --

THE COURT: Why don't I have him --

MS. LA FRANCE: Well, Your Honor, you know --

THE COURT: I'm going to give them an instruction about prejudice and say what they --

MS. LA FRANCE: Okay. All right.

(Sidebar concluded.)

MS. LA FRANCE: Now, think about that. His story changed. When he told Detective Phelps he saw three guys, and his story, right, on the stand was that these guys were just walking through, never they were stopped or anything. These three guys who he is blaming for this just walked right through. [262] He never says he saw them do anything to any cars.

But, also, he neglects to mention to Detective Phelps that one of them was riding a bike until he had access to the reports. Oh, now, all of a sudden, once he knows that there's a bike involved, his story up on the stand is, oh, yeah, one of them was riding a bike. After he hears Nubia testify that somebody was riding around on a bike, all of a sudden, oh, yeah, one of the guys I saw was riding on a bike. He never mentions that to Detective Phelps.

And the defense attorney says, well, that's not something he would mention. Really? That's not something a person would mention when talking to the police? Isn't that kind of a key item to mention? If a person is a witness to a crime, their mode of transportation isn't something key? That would be like saying, you know, their race, were they black, were they white, were they Hispanic. If a person is in a car accident, you better believe the -- one of the questions that a witness is going to say, or one of the information a witness gives is what kind of car

they were driving, or at least what color it is. So the fact that one of the guys he's -- the defendant is claiming did this is on a bike, surely he would have mentioned that to Detective Phelps. That would have been important to him to remember because he certainly made mention of the fact that he [263] knew one of the guys. He mentioned his name. But not the fact that one of them was on the bike.

And, lastly, I just want to talk to you about the jury instructions. One of the jury instructions is that in the theft, he has to act with a purpose to deprive. And I just want to -- it's explained in the jury instructions, but I ask you to remember that just because Officer Clay thwarted the defendant in his attempt to follow through on this does not mean he didn't act with the purpose to deprive. He took the amps. He was getting ready, or he had put aside those speakers to go back and get them. Just because he was thwarted in that does not mean he did not have that purpose to deprive Alex of those items. Just keep that in mind because it -- I believe, as the instructions read, it may not be clear, and I would submit to you that the purpose to deprive was when he was carrying those, not the fact that he was able to take them away and hide them or bring them to Cash Converters and sell them. The fact is when he had those speakers, when he committed that crime, he had that specific purpose, whether or not he was able to actually follow through. The fact that Officer Clay stopped him doesn't matter. You need to decide if, when he committed the crime, he had that purpose.

And, ladies and gentlemen, I would submit to you that Barion Perry did have that purpose. He knew what he was doing. [264] [Jury Charge] He went through, he

found a car, he knew the area, he knew the people in the area, he committed these crimes. I ask that you find him guilty. Thank you.

THE COURT: Thank you, Ms. LaFrance.

Members of the jury, the evidence in the case has been completed, and I will now instruct you as to the law that applies to this case. You will then retire to decide upon a verdict.

In order to reach a fair and just verdict, you must understand and follow the law as I explain it to you. Your role in this trial is to pass upon and decide the fact issues in this case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, determine the credibility of the witnesses, resolve such conflicts as there may be in the testimony, and draw whatever reasonable inferences you decide to draw from the facts as you have determined them.

Although you, as jurors, are the sole judges of the facts, you are duty bound to follow the law as stated in these instructions of the Court. It is your function to apply the law as given to you in these instructions to the facts as you find them. If any lawyer in argument or otherwise has stated a legal principle that is different from that which I state to you in these instructions, it is these instructions that you must [265] follow.

You are not to single out one instruction of the Court alone as stating the law; rather, you must consider the instructions as a whole. Neither are you to be concerned

with the wisdom of any particular rule of law. Excuse me. Regardless of what you might think the law is or ought to be, it would be a violation of your sworn duty as jurors to base a verdict upon any other view of the law than that stated in these instructions of the Court.

In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements and closing arguments, in their objections, or in their questions, is not evidence. In this connection, you should bear in mind that when a witness is asked a question which contains factual assertions, the facts so asserted do not become evidence unless in answering the question the witness agrees that such facts are true. If the witness disagrees with the facts asserted or denies that such facts are true, then unless there is other evidence to prove that the facts exist, you may not find the facts asserted to be true merely because a lawyer asked a question including such facts. Nor is anything I may have said during the trial or may say in these instructions with respect to a fact matter to be taken in [266] substitution for your own independent recollection. In short, what I'm telling you now is not evidence, either.

The evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them, all exhibits received in evidence, regardless of who may have produced them, and all facts which the parties have agreed or stipulated are true. You may not consider any testimony that I directed you to disregard or that I ordered stricken from the record. You also must disregard and not speculate as to what the answer might

have been to any questions as to which an objection was sustained.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts, or as to what your verdict should be. The rulings I have made during the trial are not any indication of my view of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt. I also ask you to draw no inferences from the fact that I may have asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters, and certainly were not intended to suggest any opinion on my part as to the verdict you should render or as to whether any witness may have been more or less credible than any other witnesses.

[267] During the course of this trial, there may have been occasions when it was necessary for the lawyers to confer with me out of your hearing. In such situations, you should not feel slighted. You are not to speculate or muse as to what was being discussed, and, likewise, you should hold no resentment toward an attorney who requested permission to come to the bench, or who asked that you be excused from the courtroom.

Similarly, during the trial, there were objections by counsel and rulings by the Court on various matters. You should hold no resentment toward an attorney who made an objection or the party which that attorney represents, for it is the duty of the attorneys for both sides to raise objections when they believe that testimony or other

evidence is being improperly admitted or excluded from the trial.

Under your oath as jurors, you are not to be swayed by fear, prejudice, bias, or sympathy, either for or against the defendant, for or against the alleged victim, or for or against the State. If, after your full consideration of the evidence, you have a reasonable doubt as to the defendant's guilt, you must not hesitate for any reason to return a verdict of not guilty. But on the other hand, if you find that the State has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or for any [268] other reason to render a verdict of guilty.

The fact that the defendant has been charged with offenses and brought to stand trial is not evidence of guilt. The indictment and information are simply a way of giving the defendant notice of the charges against him. They are the formal way of accusing the defendant of the crimes charged in order to bring him to trial. In your deliberations, you must not consider the indictment or the information, or the fact that the defendant has been brought to trial as evidence of the defendant's guilt.

Each of the charges against the defendant constitutes a separate offense. You must consider each charge separately and decide whether the State has proved the defendant's guilt beyond a reasonable doubt of that particular offense. The fact that you may find the defendant guilty or not guilty of any one charge is not determinative of your verdict on any other charge.

Appendix I

Your decision should not be influenced by the possible punishment of the defendant if you return a guilty verdict. The duty of imposing sentence is for the judge alone. You should base your verdict only on the evidence and the law without considering the issue of punishment of the defendant.

There are two types of evidence which you may properly use in reaching a verdict in this case. One type of evidence is called direct evidence. Direct evidence consists of the [269] testimony of a witness as to what is known to the witness of his or her own knowledge by virtue of the witness's own senses; that is what he or she sees, hears, smells, tastes, or touches.

The other type of evidence is circumstantial evidence. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example which I often use to demonstrate the difference between direct and circumstantial evidence. Assume that this courtroom had windows to the outside, and that in looking out, you could see that it was raining. That would be direct evidence that it was, in fact, raining outside.

Now assume, as is actually the case here, that the courtroom has no windows to the outside, but that as you are sitting here, someone walks in the back door wearing a raincoat and carrying an umbrella, both of which are dripping wet. Now, since you cannot see outside, you have no direct evidence that it was raining. But on the facts I have asked you to assume, it would be reasonable and

logical for you to conclude that it was raining outside. That's all there is to circumstantial evidence. You infer on the basis of reason and common sense from an established fact the existence or non-existence of some other fact.

The law makes no distinction between the weight to be [270] given to direct or circumstantial evidence. However, to be sufficient to establish guilt beyond a reasonable doubt, circumstantial evidence must exclude all other rational conclusions. This means that if, based on the circumstantial evidence, it is rational to arrive at two conclusions, one consistent with guilt and the other consistent with innocence, you must choose the rational conclusion consistent with innocence.

In determining whether all rational conclusions except guilt have been excluded, you do not consider each item of circumstantial evidence in isolation; rather, you must consider each particular item of evidence in the context of all other evidence in the case, including both direct and circumstantial evidence.

You must understand also that the principle I just explained to you, that if two rational conclusions are possible from the circumstantial evidence you must choose the one consistent with innocence, applies only with respect to circumstantial evidence, not to direct evidence. Thus, if you have a conflict between two or more witnesses who offer direct evidence concerning certain facts, this so-called two inference rule does not apply.

For example, if in a particular case one witness places [271] the defendant at the scene of an alleged crime,

and another witness who also was present at the crime scene testifies that the defendant was not present, you have a direct conflict in the evidence, and the two inference rule does not apply.

Instead, in this situation, a jury must decide which, if either, version of the events is true, and whether, based upon all the evidence, the State has proved the defendant's guilt beyond a reasonable doubt.

You, as jurors, are the sole judges of the credibility of the witnesses, and the weight their testimony deserves. That is, it is up to you to decide who and what to believe. If there is any conflict between the witnesses, then you must decide where the truth lies. Simply because a witness has taken an oath to tell you the truth does not mean that you have to accept his or her testimony as true.

You should carefully scrutinize all the testimony given on both direct and cross-examination, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind, and demeanor on the witness stand. Consider the witness's opportunity and ability to observe the matters as to which he or she has testified, and whether the witness impresses you as [272] having an accurate recollection of these matters. Consider also any relation each witness may bear to any party or side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other testimony or evidence in the case.

Appendix I

You should consider these factors in evaluating the credibility of all the witnesses, whether they happen to be ordinary citizens or law enforcement officers. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you as jurors to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. Innocent mis-recollection, like failure of recollection, is not an uncommon human experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own evaluation of credibility, you should give the testimony of each witness such credibility as you think it deserves. You may accept all of what a witness has said; you may reject all of what a witness has said; or you can [273] accept some and reject some of what a witness has said.

In determining the credibility to be given to the testimony of each witness, you should use your common sense, your good judgment, and your life experience.

You have heard evidence that the defendant has previously been convicted of one or more felony offenses. I'll remind you again that you may consider such evidence only for such bearing, if any, as you find it may have in assessing the defendant's credibility as a witness. You may not use the prior convictions as evidence of the defendant's general bad character or propensity to engage in criminal

conduct, and to convict him of the present offense on this basis. In other words, you cannot say to yourself, well, if he committed these past offenses, then he must have committed the offense at issue -- the offenses at issue here also. That is impermissible and would be a violation of your sworn oath as jurors. Remember, the defendant is not on trial for any conduct other than the two offenses arising out of the events that allegedly occurred on August 15 of 2008.

Under our State and Federal Constitutions, all defendants in criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt. The burden of proving guilt is entirely upon the State. The defendant does not have to prove his innocence. The defendant enters this courtroom as an [274] innocent person, and you must consider him to be an innocent person unless and until the State convinces you beyond a reasonable doubt that he is guilty of every element of the offense you are considering.

The State does not have to prove every fact in the case beyond a reasonable doubt. What it must prove beyond a reasonable doubt from all the evidence in the case are th elements of the offense with which the defendant is charged -- of each offense with which the defendant is charged.

A reasonable doubt is just what the words would ordinarily imply. The use of the word "reasonable" simply means that the doubt must be reasonable rather than unreasonable. It must be a doubt based upon reason. It is not a frivolous or fanciful doubt, nor is it a doubt that can easily be explained away. Rather, a reasonable

doubt is such a doubt based upon reason as remains after consideration of all the evidence that the State has offered against it. A reasonable doubt may arise either from the evidence or from a lack of evidence.

The test that you must use is this: If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime you are considering, you must find the defendant not guilty of that crime. However, if you find that the State has proved all of the elements of the crime [275] charged beyond a reasonable doubt, you should find the defendant guilty.

The defendant is charged in Indictment No. 08-S-1797 with the crime of theft by unauthorized taking. The definition of this crime has two elements, each of which the State must prove beyond a reasonable doubt in order for you to find the defendant guilty. These elements are, first, that the defendant exercised unauthorized control over property belonging to another person, in this case the speakers and amplifiers of Alex Clavijo, and, second, that the defendant acted purposely, that is, that the defendant had the specific intent or conscious object to deprive the other person, that is Mr. Clavijo, of the property.

To act with a purpose to deprive another person of property means to have the specific intent or conscious object to withhold the property permanently or for so extended a period, or to use it under such circumstances that a substantial portion of its economic value or of the use and benefit of the property would be lost, or to restore the property only upon payment of a reward or other compensation, or to dispose of the property under

circumstances that make it unlikely that the owner will recover it.

Property of another means property in which any person other than the defendant had an -- has an interest which the [276] defendant has no right or privilege to infringe.

The defendant is charged in Indictment No. 08-S-1798 with the crime of criminal mischief. The definition of this crime has four elements, each of which the State must prove beyond a reasonable doubt in order for you to find the defendant guilty.

These elements are, first, that the defendant damaged property of another, in this case the motor vehicle of Alex Clavijo;

Second, that the damage caused to the motor vehicle was in excess of $100;

Third, that the defendant had no right to damage such property, nor any reasonable basis to believe he had a right to damage the property;

And, fourth, that the defendant acted purposely, that is that the defendant had the specific intent or conscious object to damage the property in question.

Keep in mind that there is often no direct evidence of the mental state with which a person acts because there is no way of directly looking into the operation of a person's mind. Of necessity, intent must often be proved

circumstantially by a defendant's conduct and by your examination of all the facts and circumstances, as shown by the evidence.

[277] Possession by a defendant of property recently stolen, if not satisfactorily explained by other facts and circumstances as shown by the evidence, is a circumstance from which the jury may infer, but is not required to infer, that the defendant not only knew that the property was stolen, but also participated in the theft of the property in some way. The term "recently" is a relative one, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all of the other facts and circumstances of the case. This application of circumstantial evidence is governed by the same principles that apply to all other circumstantial evidence as explained to you previously. It is solely for you as jurors to determine what inferences, if any, should be drawn from the evidence presented in this case.

I also remind you again that the State has the obligation of proving the defendant's guilt beyond a reasonable doubt and that the defendant has no obligation to call any witnesses, or produce any evidence whatsoever.

You will notice that in describing the elements of the offense, I indicated that they each require that the defendant have some -- have done certain things or have acted with a certain state of mind. This means, of course, that as part of proving the elements of the offense, one of the things the State [278] must prove is the identification of the defendant as the person who committed the offense.

Appendix I

The State must prove beyond a reasonable doubt that the defendant before you, Barion Perry, was in fact the person who committed the crimes with which he has been charged.

You, as jurors, must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crimes. If you are not convicted beyond a reasonable doubt that the defendant was the person who committed the offenses, you must find the defendant not guilty.

Identification testimony is, in essence, the expression of a belief by the witness offering such testimony. The value of the identification depends upon the opportunity that the witness had to observe the person who committed the crime at the time of the offense, and the opportunity to make a reliable identification at a later time. In judging identification testimony of any witness, you should consider the following:

First, does the witness have the capacity and an adequate opportunity to observe the person in question at the time of the crime? In determining this, you may consider such factors as the length of time available for the observation, the distance between the witness and the person observed, the lighting conditions, the degree to which the witness was paying [279] attention to the person observed, the accuracy of any description of the alleged perpetrator given by the witness, whether the witness had occasion to see or know the person identified in the past. In general, a witness bases any identification he or she makes on his or her own perception through the use of his or her senses. Usually, a witness identifies someone

by the sense of sight, but this is not necessarily so, and the witness may use other senses, such as the sense of hearing that may be involved in recognition of a person's voice.

Second, was any identification made by a witness after the crime the product of his or her own recollection. In making this determination, you may take into account both the strength of the later identification and the circumstances under which the later identification was made. If the identification was influenced by the circumstances under which it was made, you should examine the identification with great care. You may wish to consider the length of time that elapsed between the commission of the crime and the later opportunity of the witness to observe the defendant, and the consistency or lack of consistency between any description of the physical characteristics or clothing of a subject given by the witness, and the appearance of the defendant when arrested, or as he appears in court.

[280] Three, you should consider whether the witness either identified or failed to identify the defendant on a prior opportunity and whether the witness either did or did not identify someone else as the person who committed the offense charged.

Fourth, you may examine the credibility of a witness making an identification in the same manner as you would any other witness, including whether you consider the witness to be truthful and whether the witness had the capacity and opportunity to make a reliable identification of the person observed.

Fifth, finally, you may consider the extent to which, if at all, the testimony of an identification is either supported or contradicted by other facts or circumstances, as shown by the evidence.

Ladies and gentlemen, this case is important to both of the parties, the State and the defendant. In your deliberations, you should follow the instructions which the Court has given you. You should not decide the case on bias, prejudice, sympathy, but with honesty and understanding.

Based on our English common law heritage, we follow in this country what is known as the adversarial system of justice, which means that the parties occupy an adversarial posture with respect to one another, and each side advocates for the position [281] favorable to its interests. History has taught us that this system affords the greatest opportunity for the ascertainment of truth which, after all, is the ultimate purpose for our all being here. But merely because we follow the adversarial system, you should not regard this trial as in any sense analogous to a sporting contest. What you are doing is much more important than that.

In particular, members of the jury, you must never view the issue here as being whether the State will win this case. Remember this: Under our system of law, the State, as representative of the people, always wins as long as justice is done. In reality, ladies and gentlemen, you are the embodiment of justice for this case. As long as you arrive at your decision fairly and impartially, based solely upon the facts as you find them, and the instructions

-- and the law as given to you by the Court, then whatever your verdict, whether it be guilty or not guilty, justice has been done and the legitimate interests of the State have been fully served.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, each and every juror must agree with the verdict. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another [282] and to deliberate with a view towards reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your views and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or merely for the purpose of returning a verdict. Remember, you are not partisans. You are judges, judges of the facts.

A verdict form has been prepared for your convenience. You will take the form with you to the jury room and you will also have with you all of the exhibits which have been properly received in evidence. The verdict form contains spaces for you to check off whether you find the defendant guilty or not guilty of each offense. Once you have finished your deliberations, your foreperson

completes the verdict form, signs it where indicated, and then notifies the court officer, who will give the form to me. After I review it, I will return the form to the foreperson, and you will return to the courtroom where, in response to inquiry by the clerk of court, the foreperson will announce your verdict here in open court.

[283] If it becomes necessary during your deliberations to communicate with me, you may send me a note through the court officer signed by the foreperson or by one or more members of the jury. No member of the jury should attempt to communicate with me by any means other than a signed writing, and I will not communicate with any member of the jury on any subject touching the merits of this case otherwise than in writing or orally here in open court.

Bear in mind also that you are never to reveal to any person, not even to me, how the jury stands numerically or otherwise until after you have reached a unanimous verdict.

May I see counsel, please?

(At sidebar.)

THE COURT: Any objections to the charge?

MS. KOWALEWSKI: No.

MS. LA FRANCE: No.

THE COURT: Okay.

(Sidebar concluded.)

(Court and court personnel confer.)

THE COURT: May I see counsel again just for a moment, please, while the court officer is doing something?

(At sidebar.)

THE COURT: I didn't select the jury in this case, so [284] did you both agree that you'd do the alternates randomly, or do you want to --

MS. LA FRANCE: Yeah.

MS. KOWALEWSKI: Yeah --

THE COURT: Random. So I'll just -- okay. I got a cup. Stay right here.

(Pause in proceedings.)

MS. LA FRANCE: Judge, do you want me to get the transcripts prepared, or just leave them with the clerk? No, I mean just give them -- that way they're not all sharing one.

THE COURT: Sure, yeah.

MS. LA FRANCE: I can just give them to the ...

THE COURT: You've marked one as --

MS. LA FRANCE: As an exhibit.

THE COURT: -- as an exhibit.

MS. LA FRANCE: One is an exhibit, and the rest are just for convenience.

(Sidebar concluded.)

(Pause in proceedings.)

(Alternate jurors selected.)

THE COURT: Ladies and gentlemen, as you know, there are -- this little exercise was designed to randomly select two of you to be alternates, because as you know, we have fourteen of [285] you. Only twelve get to deliberate. The two alternates will be Juror No. 5, Ms. Ackerage (sic)? Have I got that right? Sandra Ackerage?

UNIDENTIFIED: No, it's Sandra George.

THE COURT: Sandra George. I'm sorry. I don't know what I was -- Sandra George. Ms. George, you will be one of the alternates.

And the other is Juror No. 11, Mr. Grigas. Is that correct? All right. You'll be the other alternate.

I want to thank both of you for your service on behalf of the court system and both of the parties. I wish

I could tell you that means you could leave early, but it's not quite that simple. The reason we have alternates, as you probably know, is we have to have twelve to deliberate, and, you know, sometimes people have emergencies or get sick or whatever, and so that's why we always select more than twelve. It is possible that that could still happen while the jury is deliberating, and so for that reason, I'm going to ask both of you to please remain here at the courthouse. The court officers will segregate you from the deliberating jury. I'm going to ask you to remain here until the jury has returned a verdict.

And because you might still get pressed into service, I'm also going to ask you please don't discuss the case with [286] anyone or among yourselves until after the jury has returned a verdict.

With regard to the other twelve of you who will be deliberating, as your first order of business, you should select your foreperson. You can do that any way you want. Somebody can volunteer to be the foreperson, you can have a little election to do that, any way you want. That's up to you. It's the foreperson's job to basically be the sort of chairperson of the meeting of all the jurors. The foreperson presides over the deliberations. It's his or her job to make sure everybody gets a chance to have his or her say, that everybody gets listened to, that kind of thing. And then when you arrive at a verdict, it's the foreperson's job to complete the verdict form.

I'm going to give you a copy of the written instructions that I just read to you. If you have a question

about the law, I'd ask you to look at this first and, hopefully, that will explain -- you know, answer it. If it doesn't, then don't hesitate to send me a note, okay?

The other thing, ladies and gentlemen, is it's really important, the heart of the jury system really is collective wisdom. And so for that reason, it's very important that you -- that everybody gets to hear what everybody else has to say. So for that reason, I'm going to ask you please conduct your [287] deliberations only when all twelve of you are present. So if somebody wants to take a break, needs to use the lavatory, whatever, suspend your deliberations until everyone has returned so everybody gets to hear what everyone has to say.

The other thing I'm going to say to you just so you'll know, you've heard reference made to the transcript of the two interviews of the defendant, and you're going to have that as an exhibit. We've also provided extra copies so that each of you will have a copy of it and, you know, you don't have to sort of all be looking over each other's shoulder to look at it. You'll each have a copy to look at.

What I'm going to do now, ladies and gentlemen, I'm keenly aware of the hour and there's probably some stomachs growling here. So what I'm going to do is this: I'm going to recess now for lunch, ask you to go have your lunch. Don't discuss the case, don't deliberate, I mean, don't talk about it with each other; go have your lunch, come back at two o'clock, and then you can start your deliberations then. Okay? But please don't discuss the case until you come back from lunch. Okay?

Thank you very much.

(Jury excused for recess.)

(Court and court personnel confer.)

[288] [Verdict] (Recess taken at 1:04 p.m.)

(Proceedings resume at 2:58 p.m.)

(Jury present in court.)

(Call to order of the court.)

THE CLERK: Mr. Perry, if you'll remain standing? And would the foreperson please stand at this time? Ms. Foreperson, it is the Court's understanding that the jury has reached a verdict. Is that correct?

THE FOREPERSON: Yes, it is.

THE CLERK: All right. Then, with respect to Indictment 08-S-1797, charging Mr. Perry with the crime of theft by unauthorized taking, how say you? Is the defendant guilty or not guilty?

THE FOREPERSON: Guilty.

THE CLERK: You find the defendant guilty?

THE FOREPERSON: Yes.

THE CLERK: So say you all, ladies and gentlemen of the jury?

THE JURY: Yes.

THE CLERK: With respect to the remaining indictment, 08-S-1798 charging the defendant Mr. Perry with the crime of criminal mischief, how say you? Is the defendant guilty or not guilty?

[289] THE FOREPERSON: Not guilty.

THE CLERK: You find the defendant not guilty?

THE FOREPERSON: Yes.

THE CLERK: So say you all, ladies and gentlemen of the jury?

THE JURY: Yes.

THE CLERK: Thank you.

THE COURT: All right. You may be seated, Mr. Perry. Yes?

MS. KOWALEWSKI: I'm sorry, Your Honor. May I have the jury polled on the first charge, please?

THE COURT: Yes, absolutely.

MS. KOWALEWSKI: Thank you.

(Jury Polled. Verdict 12-0)

THE COURT: Thank you.

Mr. Perry, you may be seated.

Ladies and gentlemen, I want to thank you for your service in this matter. If I can impose upon you for just about another five minutes, I have a brief legal matter to take up with the parties, and I'd like to ask you to return to the jury room if you would. I'd like to take an opportunity to thank you personally for your service in this matter. And I'll also answer any questions that you may have, not about the case or about your [290] [Bail Hearing] verdict, I should say, because that's entirely your business and it's really not my business. But if you have any questions about court procedure or how the trial was conducted or whatever, I'll try to answer those questions if I can. Okay? And I'll be back in about five minutes. All right.

(Jury excused.)

THE COURT: All right. I take it the defendant is in custody now. Is that right? So we're just -- bail -- I mean, the bail was revoked pending sentencing, but --

MS. LA FRANCE: Oh, then it is revoked?

THE COURT: I mean, that's what I'm going to do unless there's some reason not to do that.

MS. KOWALEWSKI: Okay. I don't have -- I mean, at this point, all I can -- I know that there's a statutory

precedent for revoking the bail. I would just ask that the Court note that his family is in the courtroom. He's not a risk of flight. He's not going anywhere. And I would ask that bail remain as is.

THE COURT: What is the bail right now?

MS. KOWALEWSKI: He posted I think 5,000 cash or surety.

THE DEFENDANT: Yes.

THE COURT: Okay. And he's -- so he's released right now? Is that --

[291] MS. KOWALEWSKI: He's in custody in another matter.

THE DEFENDANT: That's -- and so --

MS. KOWALEWSKI: Sh. He's in custody in another matter, sir.

THE COURT: Okay. All right.

MS. LA FRANCE: Your Honor, I would ask that his bail be revoked. He is a huge flight risk now. He has not only this charge, but he also has a suspended sentence which is still hanging over his head. Given his extensive criminal history, I feel now he is a flight risk because he knows he's looking at many years.

THE COURT: I agree with the State. I cannot find by clear and convincing evidence what I'd have to find, that the defendant does not pose a danger to the community or to other people, or that he's not a flight risk. I think that both of those things are true, that he is a flight risk and he does pose a danger. Accordingly, his bail is revoked --

THE DEFENDANT: May I say something, Your Honor?

THE COURT: Pardon?

THE DEFENDANT: May I please speak to you -- or say something?

THE COURT: No. No. The defendant's bail is revoked, and he is to be held -- detained pending sentencing, okay? And I [292] assume we want a presentence report. I'll ask that one be prepared.

MS. KOWALEWSKI: Yes.

THE DEFENDANT: What is the sentence?

MS. KOWALEWSKI: Your Honor, also, I'm assuming the State is going to be filing a motion to impose a suspended sentence. If that's the case, I would ask that the motion be hearing be scheduled on the same day as the sentencing on this charge.

MS. LA FRANCE: Yeah, that would make sense. Absolutely, Your Honor.

THE COURT: Yeah, that's fine. All right. Very good. Thank you very much. Okay.

(Proceedings concluded at 3:02 p.m.)

* * * *

APPENDIX J — BRIEF FOR DEFENDANT IN THE NEW HAMPSHIRE SUPREME COURT, DATED FEBRUARY 16, 2010

THE NEW HAMPSHIRE
SUPREME COURT

No. 2009-0590

State of New Hampshire

v.

Barion Perry

Appeal Pursuant to Rule 7 from Judgment of the Hillsborough County Superior Court Southern District

BRIEF FOR THE DEFENDANT

Alex Parsons, Bar # 17147
New Hampshire Public Defender
1 West Street
Keene, NH 03431
(603) 357-4891

(5 Minutes 3JX Argument)

[APPENDICES TO BRIEFS
INTENTIONALLY OMITTED]

Appendix J

QUESTION PRESENTED

Whether the court erred in permitting the State to present evidence of an out-of-court identification of Barion Perry.

Issue preserved by pre-trial defense motion to suppress the out-of-court identification (mislabeled as ***Motion to Suppress Photo Identification***), the State's response, and the court's ruling. App. 1-23.[1]

STATEMENT OF THE CASE

Perry was charged with criminal mischief and theft by unauthorized taking. Prior to trial, Perry challenged the admissibility of the out-of-court identification made by Nubia Blandon. App. 1-4. Following a hearing, the court (Sullivan, J.) denied the motion. App. 17-23. Perry stood trial for two days, June 16-17, 2009, after which the jury found him guilty of theft by unauthorized taking and acquitted him of criminal mischief. T2 288-89. The court sentenced Perry to 3 to 10 years at the New Hampshire State Prison. App. 24-32.

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1. Citations to the record are as follows:

"M" refers to the transcript of a motion hearing conducted April 20, 2009.

"T1" through "T2" refer respectively to the transcripts of the two days of trial conducted June 16 and June 17, 2009.

"App." refers to the Appendix filed with this brief.

Appendix J

STATEMENT OF THE FACTS

A. Introduction

In the early morning of August 15, 2008, a Honda Civic belonging to Alex Clavijo was broken into through a rear window while parked in a lot adjacent to the apartment building in which Clavijo resided. T1 32-41, 83-84, 104-105. Clavijo reported that stereo equipment, a wrench, and a bat were removed from the car. *Id.*

Two of Clavijo's neighbors from the same apartment building, Nubia Blandon (also referred to as Nubia Castro or Blandon-Castro) and Joffre Ullon, a married couple, called the police to report suspicious activity by a man they observed in the parking lot. T1 67, 109-113, 124-26, 130-38. Only Blandon claimed to have observed any actual criminal activity, i.e., she said that from her apartment window, she observed the man removing items from the rear of the car. T1 110.

B. Suppression Hearing Testimony

Nashua Officer Nicole Clay was the only witness called to testify at the suppression hearing. Clay testified that on August 15, 2008 at approximately 2:52 a.m., she was dispatched to the parking lot of a large apartment building for a report "about a black male looking through vehicles and attempting to gain entry into vehicles." M 7-8, 13.

Upon her arrival, Clay heard a metallic clang that sounded like a bat hitting the ground. M 8-9. Clay

observed Perry standing in the lot holding amplifiers. *Id.* Perry walked toward her. *Id.* Clay asked Perry to put down the amplifiers and speak to her, which he did. *Id.* Perry explained that he had found the amplifiers on the ground and was moving them. M 10.

Clay said that Perry told her that before her arrival he had seen two individuals leaving the lot. *Id.* Perry pointed out another male nearby and identified him as one of the individuals he had seen. M 11. Clay questioned this other man briefly before letting him go. M 12.

At this point, Clavijo approached Clay and identified himself as the owner of the car that had been broken into. M 12. Clavijo told Clay that he did not see anything but that his neighbor did. M 33. Clavijo and Clay went into the apartment building together to speak with Blandon. M 12-13.

Before going inside, Clay asked Officer Robert Dunn to stand with Perry, and the two of them remained standing together in the lot. *Id.* Clay testified that she knew when she asked Dunn to stand with Perry that Blandon had seen someone breaking into the car. M 45. Dunn was in full uniform. M 27. Both Clay and Dunn had arrived in fully-marked police cruisers. M 28. While Perry stood with Dunn, Perry was the only black man in the area. M 33. No one else stood with Dunn. *Id.*

Clay spoke with Blandon in the hallway outside her apartment, with Clavijo translating. M 14. Clay testified that the apartment was on the second or third floor. M 13, 19. Clay

could not see Perry from where she spoke with Blandon. M 14.

Clay asked Blandon for a description of the man she had seen. M 18. The only description Blandon provided was that he was a tall black man. *Id.*, M 30. She gave no description of the man's facial features, facial hair, clothing, etc. M 30.

Blandon told Clay that the man presently standing in the "back lot" with the police officer (Dunn) was the man she had seen previously. *Id.*, M 35. Clay testified that Blandon "kind of went back into her apartment and pointed towards the window to show me that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot." *Id.*

Clay testified that Blandon told her that she had seen the man walking and looking in the twelve to fifteen cars in the lot before circling Clavijo's car, opening the trunk, and taking a large item from the trunk. M 24-25. Clay said Blandon told her she saw the man carrying a bat. *Id.* The two amplifiers Clay found Perry holding were different than the one large item Blandon said she had seen the man removing from the trunk. M 37-41. The large speaker box Blandon was presumed to have seen was found in a different part of the lot from where Clay encountered Perry. *Id.*

Blandon did not tell Clay how she came to observe the man in the lot or how long she observed him. *Id.* Clay said she did not know how long Blandon was at the window

before Clay knocked on her door. M 47. Clay admitted that the man's actions as described by Blandon could have occurred in "a couple of minutes." M 32.

Clay never asked and Blandon did not say if she was constantly at the window after first spotting the perpetrator. M 31. Clay never asked and Blandon did not say if she was doing other things during the time the perpetrator was in the lot. *Id.* Clay never asked and Blandon did not say if she was on the phone while observing the perpetrator. *Id.*

Clay never looked out Blandon's window to see Blandon's point of observation. M 26. Clay testified that the parking lot was "fairly well lit", but also said it was the middle of summer, so the trees had leaves. M 25-26. She said that when she went inside to speak with Blandon, Perry and Dunn were in the middle of the lot, and the lighting was "excellent." M 26-27. However, when she returned to the lot, Perry and Dunn were at the end of the lot about thirty feet from the building, where the lighting was "a little bit darker." M 26.

Blandon was later shown a photo array. M 28. She was unable to pick Perry from the array. *Id.*

The State never argued that the scenario of Perry standing with Dunn in the lot was not suggestive, but only that the identification should not be suppressed because the police did not act intentionally to set-up the scenario. M 20, 42-44.

C. Trial Testimony

At trial, Blandon testified that she woke up about 2:30 a.m. the morning of the incident because Ullon had to go to New York. T1 108. She testified that she looked out her apartment window over a total period of "as much as half an hour." T1 109, 112. During this time, she saw a "young man" twice circle the parking lot on a bicycle looking at cars. *Id.* She observed him leave, return without the bicycle, and approach the area of Clavijo's car. *Id.* Although she testified that her view of the rear of Clavijo's car was "perfect", she also said that her apartment was on the fourth floor; the area she was observing was "quite a distance" away; and the view of Clavijo's car was partially blocked by another vehicle. T1 110, 120-121.

Blandon testified that at first, she thought the man in the parking lot was one of Clavijo's friends, but when she saw the man opening the rear of Clavijo's car and removing the music system, she consulted with Ullon and then called the police. T1 110, 113, 126. Blandon testified that she neither saw nor heard the car window being broken. T1 121.

Ullon testified that he got up the morning of the incident about 2:15 a.m. so he could travel to New York. T1 130. He left the apartment to get coffee. T1 131. He said that while in the parking lot, he saw a person walking around, trying to look in cars. *Id.* He said that as he was about to exit the lot, he saw a man standing there and a bicycle lying on the ground. *Id.* Ullon said the man turned to avoid being seen. *Id.* Ullon drove by a second time to get a better look, but the man hid behind the cars. *Id.*

Ullon said that he continued out the lot to get coffee and while doing so, called Blandon to tell her to call the police. T1 132. He said he later called the police himself because they could not understand Blandon. T1 132-133. Blandon testified that about fifteen minutes passed from the time Ullon called the police until the police arrived. T1 125-26.

Blandon testified that after the police were called, she went across the hall to let Clavijo know what was happening. T1 111-13. She rang his doorbell several times before he awoke and answered. *Id.*

Though Blandon said she did not go to Clavijo's apartment until after seeing the police arrive, she spoke to Clavijo about the theft in the present tense. *Id.* She told Clavijo, "somebody's robbing you," and did not tell Clavijo the police were there. *Id.* Clavijo also testified that Blandon used the present tense: "they're stealing - they breaking [sic] into your car." T1 35.

Blandon said Clavijo went to the lot, "and the police were right there." T1 112. However, Clavijo described going back to sleep for five to ten minutes before going to the lot. T1 59-61. He admitted to bringing a bat with him for protection. *Id.* Clavijo testified that he "went downstairs to check [on his car]. And then the police officers arrived right there." *Id.*

Clay testified that she was dispatched to the scene following a report that there was a black man trying to enter vehicles in the parking lot. T1 67. When she arrived

at the back of the lot, around 2:50 a.m., she heard a metallic clang and then saw a tall black man holding two stereo amplifiers. T1 67-68, 93. She identified the man as Perry. *Id.* Clay said she also saw a metal bat on some debris on the ground near a fence behind Perry. T1 79, 98. She also found a box with two speakers and a maroon bicycle on the ground a couple car lengths away from where she encountered Perry. T1 79-83.

Ullon testified that he returned to the apartment to drop off the coffee and pick up his son. T1 133. He said that at the time he returned to the lot, he saw the man he had seen before in the lot with a young female police officer (presumably Clay). T1 133-34.

Clay testified that when she encountered Perry, she asked him to put down the amplifiers and speak with her, which he did. T1 69. She testified that Perry told her that he found the amplifiers in the lot and was only moving them. T1 71. At trial, Perry explained that he did not want anyone to run over the amplifiers and was only moving them out of the way. T2 222. Perry further testified that he had been taking a commonly-used shortcut through the lot and a nearby alley where it was common for people in the nearby apartments to discard refuse, including electronics. T2 205-209. Perry testified that he had had his bicycle with him earlier in the day, but had gotten a flat tire, such that he no longer had his bicycle with him when he was in the lot. T2 199-201. Perry consistently denied breaking into the car and stealing equipment. T1 71, 99; T2 163-65, 213-22.

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Perry told Clay that he had seen people running through the lot or an alley and that they must have stolen the equipment. T1 71-74, 94. He testified that one of the people had been riding a bicycle. T2 214, 236-41. Clay found one man nearby, but let him go after questioning him briefly. T1 94.

Clay testified that she was then approached by the owner of the car, Alex Clavijo. T1 74-75. Clay and Clavijo went into the apartment building to speak with Blandon. T1 75-76. Before going into the apartment building with Clavijo, Clay asked Perry to wait with Officer Robert Dunn, who had arrived on the scene. T1 76, 100-101.

Clay and Clavijo spoke with Blandon in the hallway between Clavijo's apartment and Blandon's, with Clavijo translating. T1 75-76. Clay asked Blandon for a description of the person Blandon saw in the lot. T1 77. Clay testified that Blandon did not give Clay any specific description. T1 77, 102-104.

Clay said that rather than providing a description, Blandon gestured toward her apartment window and told Clay that the person she had seen in the lot was currently standing in the lot talking with the other officer (Dunn). *Id.* However, at trial, Blandon had no recollection of seeing the man with Dunn. T1 117-19.

Blandon testified that she did see the man she had seen in the lot speaking with Clay. *Id.* Blandon never explicitly testified whether she witnessed the initial encounter between Perry and Clay. *Id.* She never said she saw the

police encounter the man while he was holding stolen equipment. *Id.*

The only testimony Blandon ever gave describing the man she claimed to see removing the equipment was that he appeared to be a young man of African descent and that he had a bicycle. T1 109, 119, 127. She could not describe his clothing in any way. T1 115. She could not remember the color of the bicycle at trial or when speaking to the police. T1 127. She said she was "so scared" she "didn't really pay attention" and thus could not describe his facial features in any way. T1 127-28.

After speaking with Blandon, Clay then spoke with Ullon. T1 79, 95. Clay did not indicate that Ullon made any identification at that time. *Id.* Nor did Ullon, during his testimony, indicate he made any identification to Clay at that time. T1 133-35.

Clay arrested Perry at the scene the night of the break-in. T1 88-89. She found a tool, "silver wrench vice pliers," in Perry's back pocket that Perry told her he carried in order to fix his bicycle. T1 89-90. Perry testified that he had purchased the tool at Walmart. T2 198-199. Clavijo, however, told Clay and testified that it was his tool, taken from his car. T1 46-47, 90-92. Clavijo admitted on cross examination that the wrench was of a common type and that he had purchased it at Walmart. T1 58.

On September 21, 2008, Blandon and Ullon went to the police station. T1 128; T2 172-79, 185-87. Ullon was shown a series of photos and asked to pick out the person

he had seen in the lot. *Id.* He testified that he picked a photo, but that "it was not entirely clear" because "it was night time" and "because of his black race." T1 134, 137. At trial, Ullon confirmed the photo he picked, and the photo lineup was published to the jury. T1 134-38, T2 172-78. Ullon never made an in-court identification of Perry as the man he had seen in the lot.

Blandon was shown a photo array including a photo of Perry, but she could neither pick out any person as the man she saw in the lot nor provide a description because she "did not clearly perceive the details of his face". T1 127-28, T2 172-78. When asked at trial if she had been able to point out the person she saw taking something from Clavijo's car, Blandon responded, "Not point, as I said thank God the officer arrived in time and found out who the person was." T1 115. Blandon never made an in-court identification of Perry as the man she had seen in the lot.

SUMMARY OF THE ARGUMENT

The court erred in denying the defense motion to suppress the unreliable out-of-court identification of the defendant by Blandon, the only person who claimed to have witnessed the crime. The identification was functionally a one-man show-up, a procedure that has been found to be highly-suggestive and unreliable. Blandon observed Perry as the only black man standing near the scene of the crime, with a uniformed officer, after reporting a black man as the perpetrator. This was a highly-suggestive scenario.

Reliability, not police intent, is the critical factor in determining admissibility. Applying the five-factor

test of *Neil v. Biggers*, 409 U.S. 188, 198 (1972), the identification lacked indicia of reliability constituting clear and convincing evidence that the identification was based upon observations other than and uninfluenced by the suggestive procedure. Blandon observed the perpetrator from a distance, at night, for an unknown period of time. She could only describe the perpetrator as a tall black man. She could not pick the defendant from a photo line-up. As a matter of due process under the Fourteenth Amendment of the United States Constitution and Part I, Article 15 of the New Hampshire Constitution, the identification should have been suppressed.

THE COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS BLANDON'S OUT-OF-COURT IDENTIFICATION.

The trial court erred in denying the motion to suppress the out-of-court identification by Nubia Blandon, the only witness to the crime. The court ruled that the identification was not the product of an unnecessarily suggestive procedure solely because the police did not manufacture the identification. App. 20-22. The First Circuit Court of Appeals explicitly rejected this reasoning in *United States v. De Leon-Quinones*, 588 F.3d 748, 754 (1st Cir. 2009). Having found that there was no suggestive procedure, the trial court did not assess the reliability of the identification. App. 20-22.

Blandon's out-of-court identification was not only the product of the functional equivalent of a one-man show-up and thus highly suggestive, it was unreliable for a variety

of other reasons. Specifically, as known to the trial court in making its ruling, Blandon made her observations at night from a distance above the lot, possibly for as little as "a couple of minutes"; she could not provide any description of the perpetrator other than that he was a tall black man; and she failed to pick Perry from a photo array. M 13, 18-19, 28, 30-32, 35. Under these circumstances, the out-of-court identification was simply too unreliable to be admissible.

"The dangers of misidentification are well known and documented." *State v. Leclair*, 118 N.H. 214, 217 (1978) (citing *United States v. Wade*, 388 U.S. 228 (1967)); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). Due process protects against "the primary evil" of "a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

Unreliable identifications pose a great risk of false conviction:

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness -- 'that's the man.'

Wade, 388 U.S. at 235-36 (cited in *Leclair*, 118 N.H. at 219). Suggestive identification not only threatens the fairness of the proceedings against a defendant but also:

> poses a grave threat to society, because 'if the police and the public erroneously conclude on the basis of an unnecessarily suggestive confrontation that the right man has been caught and convicted, the real outlaw must still remain at large.' *Manson v. Brathwaite*, 432 U.S. 98 (1977)

Leclair, 118 N.H. at 218.

Whether an out-of-court identification is reliable and therefore admissible is based upon the totality of the circumstances. *Leclair*, 118 N.H. at 217. "[A] trial court should suppress identification evidence on due process grounds where there is a 'very substantial likelihood' that there was an 'irreparable misidentification.'" *De Leon-Quinones*, 588 F.3d at 753 (citations omitted).

A determination as to the admissibility of an out-of-court identification involves a two-step process. *State v. Cyr*, 122 N.H. 1155, 1158 (1982). First, the court must inquire "whether the identification procedure was unnecessarily suggestive." *Id.* On this question, the defendant bears the initial burden of proof. *State v. Allen*, 133 N.H. 306, 310 (1990).

Second, if the identification procedure is found to be unnecessarily suggestive, the court then considers the

factors enumerated in *Biggers*, 409 U.S. at 199-200, to determine whether the identification procedure was not so suggestive as to render the identification unreliable and inadmissible. The five factors are: the opportunity to view the defendant; the witness's degree of attention; the accuracy of any prior description given by the witness; the witness's level of certainty at the time of identification; and the time lapse between the crime and identification. *Biggers*, 409 U.S. at 199-200.

This Court will overturn a lower court's ruling on a motion to suppress an out-of-court identification only where the decision was contrary to the weight of the evidence. *State v. Bell-Rogers*, 159 N.H. 178, 181 (2009). Here, the trial court's ruling that the identification procedure was not unnecessarily suggestive, and that the court therefore need not assess reliability, was contrary to the weight of the evidence under the totality of the circumstances.

As argued in the motion to suppress Blandon's out-of-court identification, the identification was functionally a one-man show-up. App. 1-4. A one-man show-up is "[t]he practice of showing suspects singly to persons for the purpose of identification." *Stovall*, 388 U.S. at 302. One-man show-ups are recognized as "classically suggestive." *De Leon-Quinones*, 588 F.3d at 754. Showing a witness a single photo of a suspect is an example of a procedure which is the equivalent of a one-person show-up. *Leclair*, 118 N.H. at 218. A witness's inadvertent sighting of the defendant being led into the courtroom in handcuffs at trial is also the equivalent of a one-man show-up. *De Leon-Quinones*, 588 F.3d at 754.

Here, the fact that Perry stood with uniformed police in the vicinity of the crime immediately after the report of the crime was the functional equivalent of a one-man show-up. This scenario would suggest to the person who had witnessed the crime in the lot and reported it that the police believed Perry was the perpetrator. This is particularly so when the witness reported seeing a black man commit the crime and then saw a black man standing with the police.

A suggestive scenario remains suggestive even if it was not intentionally orchestrated by the police in order to produce an identification. As stated by the First Circuit Court of Appeals:

> The government asserts that this confrontation cannot be deemed unnecessarily suggestive because it was not orchestrated or staged by the government. This argument is not particularly persuasive, however, and we have rejected a similar one in the past. In *United States v. Bouthot*, we explained: "Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process."

De Leon-Quinones, 588 F.3d at 754 (citing *United States v. Bouthot*, 878 F.2d 1506, 1516 (1st Cir. 1989)). Thus while

deterring police misconduct is an important consideration, police misconduct is not a *sine qua non* to a finding of suggestion that violates due process.

Reliability of the identification is deemed "the linchpin" of the issue. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). "[R]eliability is the key." *De Leon-Quinones*, 588 F.3d at 753. The reliability of the identification, of course, is undermined in the same way and to the same degree whether the suggestive procedure was intentional or not. "Only the effects of, rather than the causes for, preidentification encounters should be determinative of whether the confrontations were unduly suggestive." *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986) (cited with approval by *Bouthot*, 878 F.2d at 1516).

The primary case relied upon by the trial court in concluding that the identification was admissible, *State v. Fecteau*, 133 N.H. 860 (1991), is inapposite. In *Fecteau*, two identifying witnesses observed the defendant at very close range and gave consistent detailed descriptions of him, i.e., that he was 5'8" to 5'10" tall, of medium build, in his early twenties, with short dark hair, and wearing grey shorts and a white tank top. *Id.* The witnesses were brought by the police to a courthouse to see if they could identify Fecteau in court. *Id.* Before going inside the building, Fecteau drove up to the building and was identified by the witnesses, despite police attempts to prevent them from seeing Fecteau. *Id.* Inside the courtroom, the witnesses identified Fecteau again out of about twelve males in the audience. *Id.*

Appendix J

Unlike the instant case, Fecteau was never seen with the police, much less observed as the sole individual with the police immediately after the reported crime. Also unlike the instant case, the witnesses in *Fecteau* provided detailed descriptions of the perpetrator following the crime and before the suggestive scenario.

For all of the reasons above, this Court should find that the identification procedure, the functional equivalent of a one-man show-up, was unnecessarily suggestive. Once this first prong of the admissibility test is satisfied, the State bears the burden of proving "by clear and convincing evidence that the identifications were based upon observations other than, and uninfluenced by, the suggestive procedures used." *Leclair*, 118 N.H. at 219-220.

Addressing each of the *Biggers* factors in turn, first, there was not evidence to indicate that Blandon had a good opportunity to observe the perpetrator before the police arrived. At the suppression hearing, Clay could not say how Blandon came to observe the perpetrator or how long she observed him. M 37-41. The period of observation could have been as little as "a couple of minutes." M 32. Clay could not say whether Blandon's observation was interrupted or whether Blandon was engaged in other activities, such as calling the police, during her observation. *Id.* The observation took place at night from at least two or three stories above a partially-lit lot with nearby trees. M 25- 27. Clay never looked from the window herself, so she could not describe the view from Blandon's vantage point. M 26. Compare, e.g., *State v. Guay*, 130 N.H. 413, 415-418 (1988) (victim spent 30 to 45 minutes seated next

to and conversing with the defendant); *Fecteau*, 133 N.H. at 862 (two witnesses observed defendant face-to-face in well-lit area); *State v. Heald*, 120 N.H. 319, 320-321 (1980) (two witnesses observed defendant face-to-face in hotel lobby as he robbed them and another observed the defendant outside the hotel entrance for several minutes and made eye contact).

Second, the State presented no evidence regarding Blandon's degree of attention. Blandon's inability to provide any substantial description of the perpetrator tends to undermine any assertion that she did pay close attention. Compare, e.g., *De Leon-Quinones*, 588 F.3d at 15 (witness shown to have been attentive to the perpetrator when she described him as wearing a red shirt, a red cap, and latex gloves, which was corroborated by video); *Heald*, 120 N.H. at 322 (one witness said she "couldn't take [her] eyes off of his [the robber's] face or his eyes..." while another said the defendant was "the central object" of his attention).

Third, Blandon gave almost no description of the perpetrator. The only description presented at the suppression hearing was that the perpetrator was a tall black man. *Id.*, M 30. There was no testimony presented at the hearing regarding Perry's actual height. Compare, e.g., *Guay*, 130 N.H. at 417-418 (witness provided accurate description of defendant as a white male, 20 years old, shoulder-length dirty blond hair, 5'8" to 5'9", wearing a leather vest and jeans); *State v. Whittey*, 134 N.H. 310, 311-312 (1991) (victim accurately described defendant as white male between the ages of twenty and twenty-

five, approximately six feet tall, with blonde hair and a pockmarked face, wearing a light brown jacket).

Fourth, the State presented no evidence at the suppression hearing indicating that Blandon expressed either doubt or a particular degree of certainty regarding her identification. There is no indication that Clay asked whether Blandon was certain about the identification. Compare, e.g., *Whittey*, 134 N.H. at 314 (witness said she was "absolutely positive" of her identification).

Fifth, there was a relatively short lapse of time between the observation of the crime and the identification. A short period of time between the crime and the identification typically enhances the reliability of the identification because the witness's memory remains fresh. Compare, e.g., *Heald*, 120 N.H. at 323 ("Surely memories of the robber's characteristics could have dimmed only imperceptibly during" the two and a half days between the robbery and identification). However, in this case, it was precisely because the police encounter with Perry took place shortly after the report of the crime that Blandon might assume the police had apprehended the perpetrator. Further, Blandon's failure to provide any substantial description to the police, when asked immediately after the crime, indicates that she never had substantial identifying information. Thus, it was not staleness or freshness of her memory that was at issue, but rather whether Blandon ever had any reliable information regarding the perpetrator.

Finally, Blandon was unable to pick Perry from a photo array. M 28. While failures to make later identifications are not listed among the *Biggers* factors, in the instant case, the failure to identify Perry from the array clearly undermines the reliability of the identification under the totality of the circumstances. This failure to select a photo from an array of men presumably matching Blandon's meager description stands in stark contrast to Blandon's pointing to Perry as the lone black man standing with the uniformed officer.

The identification was the unreliable product of the functional equivalent of a one-man show-up. The evidence presented at the suppression hearing indicated that Blandon observed the perpetrator at night, from at least the second or third story, for an unknown period of time -- possibly as little as a couple minutes, in a partially-lit lot with leafy trees. She provided almost no description of the suspect. She did not identify Perry in a photo array. There was no evidence presented at the hearing indicating that Blandon made an uninterrupted observation of the perpetrator from the time of the theft to the moment she observed Perry standing with the uniformed officer. Indeed, the evidence in its essence was that Blandon observed a black man taking items from the car, reported this to the police, and shortly thereafter saw a black man standing with a uniformed officer near the scene of the crime. In response to this suggestive scenario, Blandon told Clay, with an unstated degree of certainty, that this was the same man. "Considering the complexity of the human mind and the subtle effects of suggestive procedures upon it", the State did not establish by clear

and convincing evidence that the identification was "based upon observations other than and uninfluenced by" the suggestive scenario. *Leclair*, 118 N.H. at 218-220

CONCLUSION

WHEREFORE, Mr. Perry respectfully requests that this Court vacate his conviction.

Undersigned counsel requests five minutes oral argument before a 3JX Panel.

Respectfully submitted,

/s/_____

Alex Parsons, Bar # 17147
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1 West Street
Keene, NH 03431

DATED: February 16, 2010

[APPENDICES INTENTIONALLY OMITTED]

APPENDIX K — BRIEF FOR THE STATE OF NEW HAMPSHIRE IN THE NEW HAMPSHIRE SUPREME COURT, DATED MAY 4, 2010

THE NEW HAMPSHIRE
SUPREME COURT

No. 2009-0590

The State of New Hampshire

v.

Barion Perry

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT FOR THE SOUTHERN JUDICIAL DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(5 minutes-3JX)

Appendix K

[TABLES INTENTIONALLY OMITTED]

ISSUE PRESENTED

Whether the trial court properly held that admission of Blandon's out-of-court identification would not violate due process where there was no state facilitated identification procedure and the defendant never argued that none was required; where Blandon spontaneously identified the defendant without any prompting to do so; where Blandon nevertheless had a good view of the defendant in the well lit parking lot, closely watched him for at least a few minutes, accurately described his actions and appearance, and positively identified him minutes after the crime; and where admitting her identification could not have affected the verdict because Ullon also identified the defendant, who was found at the scene with the stolen property.

STATEMENT OF THE CASE

On October 21, 2008, the defendant, Barion Perry, was indicted by the Hillsborough County Grand Jury for the Southern Judicial District with one class B felony count of theft by unauthorized taking, which was subject to an extended term of imprisonment because he had two prior convictions for theft by unauthorized taking and one prior conviction for burglary. ASB 1.[1] *See* RSA 637:3

1. "ADB" refers to the appendix to the defendant's brief. "ASB" refers to the attached appendix to the State's brief. "JT-1" and "JT-II" refer to the transcripts of the jury trial on June 16-17, 2009. "MH" refers to the transcript of the suppression hearing on April 20, 2009.

(2007); RSA 637:11, II(b) (2007). The defendant was also charged by information with the class A misdemeanor offense of criminal mischief. ASB 2. *See* RSA 634:2, I, II(a) (Supp. 2009). Following a two-day jury trial in the Hillsborough County Superior Court for the Southern Judicial District *(Lynn,* C.J.), the defendant was found not guilty of criminal mischief and guilty as charged of theft by unauthorized taking. ASB 1-2; JT-II 288-89. On July 27, 2009, the court *(Barry,* J.) sentenced him to serve three to ten years in the New Hampshire State Prison, and to pay restitution to the victim. ADB 24. That sentence was imposed concurrent with two concurrent terms of four to eight years the court imposed because the defendant had violated the terms of his previously suspended sentences for theft by unauthorized taking and burglary. ASB 24-32. This appeal followed.

STATEMENT OF FACTS

A. The State's Evidence At The Suppression Hearing

At 2:53 a.m. on August 15, 2008, Nashua Police Officer Nicole Clay was sent to the parking lot behind 70½ West Hollis Street to investigate "a report about a black male looking through vehicles and attempting to gain entry into vehicles." MH 7-8. When she arrived at the multi-story apartment building, she parked her cruiser out front and walked around to the parking lot. MH 8-9, 12. There were twelve to vivteen cars in the parking lot, which was "fairly well lit" by lights in the parking lot, lights on the back of the building, and streetlights on Ash Street, which was the street at the exit to the parking lot. MH 25-26.

Appendix K

As Officer Clary entered the parking lot, she heard what "sounded like a metal bat hitting the ground," and she saw the defendant carrying two amplifiers and walking toward her from between two vehicles. MH 8-9. She asked him to put the amplifiers down and come talk to her, so he did. MH 9. He then said that he was moving the amplifiers because he had just found them lying on the ground. MH 10. Officer Clay asked where they had come from, and the defendant said "that he had just seen a couple of kids leaving the parking lot," that one of them was wearing a white T-shirt, and that the other one was on Ash Street. MH 10.

Officer Clay walked with the defendant to Ash Street where he pointed out a Hispanic man who was standing outside a nearby house. MH 10-11. The man said that his name was Rowley Anzani, that he had been in the house all night, that he had just come outside to do something for his mother, that his friend had left half an hour earlier, and that he had not seen anyone else on Ash Street in the last ten minutes. MH 11-12. The defendant kept interjecting "that he had just found the amplifiers and that other kids had stolen them." MH 12.

When Officer Clay and the defendant returned to the parking lot, Alex Clavijo walked over and said that his neighbor had told him that his car had been broken into. MH 12. He also said that the large item missing from his trunk was a wooden box with two speakers mounted inside, and that the amplifiers were also his. MH 36-39. By then, Officer Robert Dunn had arrived, so she asked him to wait with the defendant while she went inside to talk to

the neighbor. MH 13-14. The defendant was just standing talking to Officer Dunn in the middle of the parking lot, and he was not handcuffed or otherwise restrained. MH 10-11, 27.

Officer Clay and Clavijo went up to the second or third floor apartment of his neighbor, Nubia Blandon, who came out and spoke to them in the hallway. MH 14. Blandon spoke only Spanish, so Clavijo translated. MH 14. Officer Clay did not tell Blandon that there was a suspect in the parking lot with an officer, and they could not see the parking lot from the hallway. MH 14, 19, 46. Blandon said that she had seen a tall, black man walk through the parking lot, look into all the cars, circle Clavijo's car, and then open the trunk of Clavijo's car and remove a large box. MH 24-25.[2] Blandon also said that the man had been carrying a bat. MH 25. Officer Clay asked for a description of the man, and Blandon pointed toward the window and said "it was the man standing outside with the police officer." MH 24. Blandon did not describe the defendant's clothing or features because the police were already talking to him. MH 30. Officer Clay did not ask Blandon how long she had been watching the defendant, but it would have taken at least a couple of minutes for him to take the actions she had described. MH 32. A month later, Blandon was unable to identify the defendant's photograph from a photographic array. MH 28.

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2. Although the hearing transcript uses the word "truck" several times, it is clear from later testimony that the item was taken from the "trunk" of Clavijo's car. JT-II 169-70.

In the meantime, Blandon's husband, Joffre Ullon, who had made the initial report about a man trying to break into cars, returned from getting coffee. MH 23, 46. He said that he had seen "a black male walking through the parking lot and lifting up on the [car] door handles." MH 24. Officer Clay asked him for a description of the man, and he also said "it was the man standing outside with the police officer." MH 24. Officer Clay went back outside and saw that the defendant and Officer Dunn had moved to the end of the lot, which was about thirty feet away and not as well lit. MH 26. She then found Clavijo's wooden box and speakers near the exit to the parking lot. MH 40.

B. Other Evidence From The State's Case At Trial

The apartment building at 70½ West Hollis Street was between Ash and Palm streets. JT-I 67. Clavijo lived on the fourth floor across the hall from Blandon and Ullon. JT-I 31-33, 120. Their apartment faced the back parking lot where Clavijo kept his black Honda Civic coupe, but his windows faced West Hollis Street, so he could not see the parking lot. JT-I 33-33, 52.

On August 15, 2008, Blandon and Ullon got up at 2:15 a.m. because Ullon had to go to New York. JT-I 108, 130. Blandon went into the kitchen and looked out the window. JT-I 109. It was a long distance down to the parking lot, "but the view was perfect." JT-I 121. Blandon was surprised when she saw a tall black man riding a bicycle through the parking lot and looking into cars, so she kept watching to see what he was doing. JT-I 109, 119. Before Ullon left at 2:30 a.m. to go to Dunkin' Donuts to get coffee,

Blandon told him that a black man was riding around on a bicycle in the parking lot. JT-I 124, 130.

Ullon went outside and saw the defendant walking around looking into cars. JT-I 131, 135. As Ullon left the parking lot, he saw a bicycle lying near the Ash Street exit. JT-I 131. The defendant was standing nearby in an area that was well lit, so he turned around to try to hide his face from Ullon. JT -I 131, 138. Ullon drove around the corner and back into the parking lot to try to get a closer look, but the defendant saw headlights and hid behind some cars. JT-I 131, 136.

After Ullon went downstairs, Blandon watched the defendant ride around the parking lot twice and then leave his bicycle by the Ash Street exit and walk over to Clavijo's car. JT-I 109, 121. Only the back of Clavijo's car was visible to her because there was a large vehicle parked next to it. JT-I 110. At first, she thought the defendant might be one of Clavijo's friends, but then she saw him open Clavijo's trunk and remove a box that was very big, so she called Ullon. JT-I 110-11, 126. At that point, she had been watching the defendant for about half an hour, but she was scared and trying to see what he was doing, so she was not paying attention to his clothing. JT-I 112. Ullon told her to call the police, so she did, but they could not understand her, so Ullon called. JT-I 110, 122-23, 132-33.

When Officer Clay walked into the parking lot, she heard a loud metal clang, saw the defendant walking out from between two vehicles carrying two amplifiers, and then saw a metal bat on the ground behind him. JT-I 67-68,

79. The defendant said that he was moving the amplifiers because he had found them in the middle of the parking lot. JT-I 71, 89-90. He also said that two other people had stolen the items and he pointed out Anzani, but Officer Clay determined that Anzani was not involved. JT-I 71, 73-74. At that point, Officer Dunn arrived. JT-I 100.

After Blandon saw Officer Clay walk into the parking lot and talk to the defendant, she went to wake up Clavijo to tell him that someone was "robbing" his car. JT-I 112-15, 119. Blandon returned to her window and Clavijo grabbed a bat for protection and went downstairs. JT-I 59-61, 112. He then saw that the left rear window on his car was broken, another window was open, there were wires hanging out of the open trunk of the car, and his two amplifiers, a large box containing two speakers, a wrench he used to open the windows, and his metal baseball bat were all missing. JT-I 35-37, 52, 57-58. Clavijo told Officer Clay what was missing, and that Blandon had told him that his car had been broken into. JT-I 40-41. Blandon saw Officer Clay and Clavijo coming upstairs, so she waited at the door and then spoke to them in the hallway. JT-I 117. Ullon returned while the defendant was in the parking lot with an officer, and then he went upstairs. JT-I 131. The police cruisers were parked on West Hollis Street, so they were not visible from the parking lot, the hallway, or the window of Blandon and Ullon's apartment. JT-I 102.

Officer Clay found Clavijo's box and speakers next to a maroon bicycle that was lying near the Ash Street exit to the parking lot, which was only a couple of car lengths from where she had first seen the defendant with

the amplifiers. JT-I 39, 47-48, 81. Officer Clay also found Clavijo's vice-grip wrench in the defendant's pocket after he was arrested. JT-I 46, 57-58, 89. The defendant said that it was his wrench, and that he used it to fix his bicycle tires. JT-I 89-90.

Later that morning, the defendant waived his *Miranda* rights and spoke to an officer. JT-II 151-71. He continued to deny breaking into Clavijo's car and stealing items from it. JT-II 171. He also claimed that earlier the same day, he had bought the same type of stereo equipment that was found in the parking lot. JT-II 155-56. He further claimed that he had used the wrench to fix the tire on his bike earlier that day, but had not ridden the bike to West Hollis Street. JT-II 164, 167. The defendant also asked to have the trunk to Clavijo's car fingerprinted before anyone had said that the trunk had been opened or that items had been stolen from the trunk. JT-II 168-69.

Blandon and Ullon were later separately shown a photograph lineup containing a photograph of the defendant. JT-II 172-77. Blandon could not identify the defendant's photograph because she had not "clearly perceive[d] the details of his face." JT -I 128. Ullon had not seen the defendant's features clearly, but he still "recognized his face," JT-I 137, and "immediately" picked out the defendant's photograph, JT-II 177.

C. The Defendant's Testimony At Trial

The defendant testified that he was 6'2" tall. JT-II 224. He claimed that he always carried an Allen wrench and

a vice-grip wrench identical to Clavijo's so that he could fix his bicycle tires, and that the officer had lied when she testified she had found only the vice-grip wrench in his pocket. JT-II 198-99, 243-44. He also claimed that he had been riding his bicycle earlier that day, that he had gotten a flat rear tire when he swerved to avoid a bunny and hit the curb, that he could not fix the rear tire because the wrench worked only on the front tire, that he had left the bicycle in the bushes behind a house on Amherst Street, and that he had walked to West Hollis Street. JT-II 199-201, 206-08.

The defendant claimed that the day before, he had bought a truck, the same type of amplifier Clavijo had, and a box and speakers similar to Clavijo's, and that although he often installed stereo equipment, someone on Ash Street was keeping the truck, so he had cut through the parking lot at 2:30 a.m. to go check on it. JT-II 201-03, 208, 228. He also claimed that he had seen three men, one of whom was as dark skinned as he was, and one of whom was riding a bicycle that was a lighter color than his silver bicycle, going through the alley to the parking lot, but it had taken him three to five minutes to get across the street, so they had been gone by the time he arrived at the parking lot. JT-II 199, 214-15, 235. He further claimed that he had never mentioned the other man's bicycle before because he had not known until trial that a bicycle was involved, but then admitted that he had known from police reports that Blandon had seen the thief riding a bicycle, and that a bicycle had been found near the box and speakers. JT-I 236, 239.

The defendant claimed that people often left electronics in the alley, that he had seen two objects in the middle of the parking lot and was trying to be a Good Samaritan and move them before they got run over, and that the officer had confronted him before he determined what they were. JT-II 207, 216-18, 222.

D. Relevant Events Before And During Trial

Prior to trial, the defendant moved to suppress Blandon's identification "pursuant to [p]art I, [a]rticle 15 of the New Hampshire Constitution, the Fourteenth Amendment [to] the United States Constitution, and the holdings of *Neil v. Biggers*, 409 U.S. 188 [(1972),] and *State v. LeClair*, 118 N.H. 214 (1978)." ADB 1. He argued that the identification procedure had been "unnecessarily suggestive" and "essentially a one-man show-up" where Blandon had "definitely" identified the defendant "only because she [had seen] him being arrested," and had "relie[d] heavily on context cues, such as handcuffs and police cruisers ...." ADB 3. He also argued that Blandon "was only able to describe him as tall, skinny and black," but "was unable to describe facial features, length of hair, hair style or what the perpetrator was wearing," and "was unable to pick him out of a line-up, which indicate[d] that she did not have sufficient time or opportunity to observe the alleged perpetrator on August 15, 2008." ADB 4.

On March 2, 2009, the State objected, arguing that the motion was untimely, and requesting additional time to respond. ADB 5. On March 11, the State filed a memorandum of law and argued that "Blandon's

identification of the defendant was not facilitated by the police in any fashion," ADB 10, and that there had been no unnecessary or suggestive procedure where Blandon had "witnessed the defendant's commission of the crime first hand" and had then identified him "independently from police facilitation," ADB 12. The State also argued that the identification had been "reliable and based on observations uninfluenced by any suggestive procedures used by the police" where it was clear: (1) that Blandon had "an excellent opportunity to view the defendant" because she had described his actions in detail and had, "without hesitation, identified him as the one with the officer," ADB 14; (2) that Blandon had paid a great degree of attention because she had accurately described the defendant's "gender and race," had said "that he was carrying a bat which was found at the scene," and had said that he had "removed a large object from the victim's car, which proved to be accurate," ADB 14; (3) that although Blandon had not given a detailed description, she had accurately described the defendant's "physical characteristics," ADB 14; (4) that Blandon had been certain and had "immediately identified him as the one in the back of the parking lot standing with the officer," ADB 14; and (5) that Blandon had made the identification "only a matter of minutes after the occurrence of the crime in question," ADB 15.

At a hearing on April 20, 2009, the defendant confirmed that he was not moving to suppress Ullon's out-of-court identifications. MH 21-23. He then argued that Blandon's identification should be excluded because "the investigation that Officer Clay conducted and the fact that she told [him] to remain where he was as well as her

lack of follow-up with the eyewitnesses [was] enough of a state action ...." MH 42. The State argued that because Officer Clay had gone with the defendant to talk to Anzani, had asked the defendant to stand with another officer only because there was an ongoing investigation, had not restrained the defendant in any way, and had not suggested that he was the suspect, MH 42, there were "no specific actions taken by the police that would establish that they [were] suggesting the identification of the defendant," which was required "in order to say that it was unduly suggestive," MH 43. The State also argued that the officers could not have controlled the conditions of Blandon's identification because they had not known that she had looking out the window. MH 43-44. The defendant then argued that Blandon had relied on context cues such as uniformed police officers and cruisers and that she had been unable to identify him when those cues were not present. MH 44. The State argued that Blandon's failure to select the defendant's photograph went only to the weight of the identification. MH 45.

The court *(Sullivan,* J.) denied the motion by order dated April 28, 2009. ADB 17-23. It ruled that "Blandon's identification of [the defendant] was not derived from any suggestive technique employed by the police." ADB 21 (citing *State v. Fecteau,* 133 N.H. 860 (1991)). It also ruled that although the facts that there were "less-than-ideal conditions for identification," that the defendant "was standing with a uniformed officer in the parking lot where the crime occurred," "that he was the only black male in the vicinity," and that Blandon could not later identify him in a photographic array might cast doubt on

her identification, ADB 21, those facts "d[id] not make the police behavior more suggestive," so it "need not consider whether the identification was otherwise reliable," ADB 22 (citing *State v. Allard*, 123 N.H. 209, 213, *cert. denied*, 464 U.S. 933 (1983)), or "whether there was an independent source for the in-court identification," ADB 22 (citing *State v. Howe*, 129 N.H. 120, 125 (1987)). Blandon's out-of-court identification was admitted at trial, JT-I 77, but she was not asked to make an in-court identification.

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion to suppress Blandon's out-of-court identification. The argument that the court erred in excluding the identification solely because it had not been manufactured by any state action is not preserved. Further, the court had actually held that that the actions of the police were not unnecessarily suggestive. That decision was not against the weight of the evidence, which demonstrated that the police cruisers had been parked where they could not be seen from the parking lot or from windows facing the parking lot, an officer had stood with the defendant only because there was an ongoing investigation and he had information, the officers had not restrained the defendant in any way, the officers had not known that Blandon had been looking out her window at the parking lot, Officer Clay had spoken to Blandon in a hallway from which they could not see the defendant, no one had told Blandon that the defendant was a suspect, and no one had asked Blandon to identify a suspect when she spontaneously pointed and identified the thief as the person standing with an officer. Further,

the identification was reliable where Blandon had closely watched the defendant commit the crime in a well-lit parking lot, had accurately described his actions and his physical characteristics, and had identified him within minutes of the crime. Moreover, Ullon's identification was admitted without objection and the other evidence of guilt was overwhelming.

ARGUMENT

THE ADMISSION OF BLANDON'S OUT-OF-COURT IDENTIFICATION DID NOT VIOLATE DUE PROCESS WHERE THERE WAS NO IDENTIFICATION PROCEDURE THAT WAS UNNECESSARY AND SUGGESTIVE, WHERE THE IDENTIFICATION WAS RELIABLE, AND WHERE ADMISSION OF THE IDENTIFICATION WAS HARMLESS.

The defendant argues that the motion court erred in denying his motion to suppress the out-of-court identification by Blandon. DB 15.

> On appeal from a motion to suppress, [this Court] will not overturn the trial court's finding unless, after reviewing the record, [it] conclude[s] that it is contrary to the weight of the evidence. To determine whether the superior court's ruling is contrary to the weight of the evidence, [this Court will] ask whether the identification procedures were so unnecessarily suggestive and conducive to irreparable mistaken identification that

> [the defendant was] denied due process of law. The defendant has the burden of proving unnecessary suggestiveness. If [he] fails to meet this burden, [this Court's] inquiry will end, and [it] will uphold the trial court's ruling.

State v. Fecteau, 133 N.H. 860, 867 (1991) (quotations and citations omitted); *see also State v. Allen*, 133 N.H. 306, 312 (1990) ("There is no need to consider the reliability issue unless the [out-of-court] procedures have been shown to be unnecessarily suggestive.").

The defendant argues that the court erred in ruling "that the identification was not the product of an unnecessarily suggestive procedure solely because the police did not manufacture the identification" where "[t]he First Circuit Court of Appeals explicitly rejected this reasoning in *United States v. De Leon-Quinones*, 588 F.3d 748, 754 (1st Cir. 2009)[, *cert. denied*, 78 U.S.L.W. 3580 (U.S. Apr. 5, 2010) (No. 09-9462)]." DB 16. That argument is not preserved.

In his motion to suppress, the defendant argued only that the identification was unnecessarily suggestive because it was "essentially a one-man show-up" at which Blandon had "relie[d] heavily on context cues, such as handcuffs and police cruisers, to make that identification," and that it was unreliable, ADB 3-4. At the hearing on the motion to suppress, he argued only "that the investigation that Officer Clay conducted and the fact that she told [him] to remain where he was as well as her lack of follow[-] up with the eyewitnesses [was] enough of a state action

...." MH 42. Therefore, his argument that no state action is required in order for the court to find that there was a violation of due process is not preserved. *See State v. Bell-Rogers*, 159 N.H. 178, 182 (2009) (declining to address unpreserved claims that a photographic array was unnecessarily suggestive); *State v. Whittey*, 134 N.H. 310, 312 (1991) (declining to address unpreserved claim "that the evidence was insufficient to establish the reliability of the identification by the clear and convincing standard required by part I, article 15 of the New Hampshire Constitution").

It is also worth noting that "[t]he majority of jurisdictions that have considered the issue [have] determined otherwise." *People v. Owens*, 97 P.3d 227, 233 (Colo. Ct. App. 2004) (citing *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972); *Semple v. State*, 519 S.E.2d 912, 914 (Ga. 1999); *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993); *Wilson v. Commonwealth*, 695 S.W. 2d 854, 857 (Ky. 1985); *Tidwell v. State*, 784 S.W.2d 645, 647 (Mo. Ct. App. 1990); *State v. Brown*, 528 N.E.2d 523, 532 (Ohio 1988); *State v. Pailon*, 590 A.2d 858, 863 (R.I. 1991); *State v. Reid*, 91 S.W.3d 247, 272 (Tenn. 2002), *cert. denied*, No. 04SC244, 2004 WL 1813920 (Colo. Aug. 16, 2004); *see also Glover v. Burge*, 652 F. Supp. 2d 373, 378 (W.D.N.Y. 2009); *State v. Nordstrom*, 25 P.3d 717, 729 (Ariz. 2001); *Sheffield v. United States*, 397 A.2d 963, 966-67 (D.C.), *cert. denied*, 441 U.S. 965 (1979); *Commonwealth v. Sylvia*, 921 N.E.2d 968, 976 (Mass. 2010); *People v. Marte*, 912 N.E.2d 37, 39 (N.Y. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); *Rogers v. State*, 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State*, 106 S.W.3d

72, 79 (Tex. Crim. App. 2003). *But see Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998); *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986).

In any event, this Court need not decide whether state action is required for a violation of due process because, contrary to the defendant's claim, a review of the opinion of the court makes it clear that it did not rule "that the identification was not the product of an unnecessarily suggestive procedure solely because the police did not manufacture the identification." DB 16. The court said:

> Mrs. Blandon pointed out Mr. Perry from her apartment window without any inducement from the police. Officer Clay did not ask Ms. Blandon whether the man standing in the parking lot was the man [she] had seen breaking into Mr. Clavijo's car and she did not direct Ms. Blandon's attention towards the window. On the contrary, Officer Clay could not even see Mr. Perry and Officer Dunn from where she was standing by the door of the apartment. Ms. Blandon's identification of Mr. Perry was spontaneously given when Officer Clay asked for a more specific description of the man Ms. Blandon had seen earlier. The fact that Mr. Perry was standing in the parking lot with Officer Dunn was coincidental; Officer Clay did not manufacture the situation in order to secure an identification. Thus, Ms. Blandon's identification of Mr. Perry was not derived from any suggestive technique employed by the police. *See State v. Fecteau*, 133 N.H. 860 (1991)

(officer's behavior not unnecessarily suggestive where they took no action to facilitate the victim's identification of defendant made after an accidental run-in).

Mr. Perry argues that the parking lot was dark, creating less-than-ideal conditions for identification, and the only reasons that Ms. Blandon was able to identify him was because he was standing with a uniformed officer in the parking lot where the crime occurred and that he was the only black male in the vicinity. He claims that his argument is supported by Ms. Blandon's inability to identify him in the photo array. The [c]ourt recognizes that these facts may cast doubt on Ms. Blandon's identification. However, they d[id] not make the police behavior more suggestive. The police did not indicate that Mr. Perry was their primary suspect—Mr. Perry was not handcuffed or otherwise restrained and, as discussed above, the officers did not direct Ms. Blandon's attention to Mr. Perry. Therefore, while Mr. Perry can inquire into the accuracy of Ms. Blandon's identification based on the environmental conditions and her later inability to identify him, these factors do not alter the suggestiveness of the police behavior. Because *the police procedures were not unnecessarily suggestive,* the identification is admissible, and the [c]ourt need not consider whether the identification was otherwise reliable.

ADB 22 (emphasis added). Therefore, it is clear that the court did not go on to the second prong of the analysis and consider the reliability of the identification because there was no unnecessarily suggestive identification procedure.

That ruling is consistent with the holding *De Leon-Quinones*. In that case, the court said: "Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize *all suggestive identification procedures*, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process." *De Leon-Quinones*, 588 F.3d at 754 (emphasis added). Therefore, under *De Leon-Quinones*, there has to have been a "suggestive identification procedure" before the reliability of the identification is scrutinized.

Further, although the court in *De Leon-Quinones* cited to its prior holding in *United States v. Lopez-Lopez*, 282 F.3d 1 (1st Cir. 2002), as supporting a position contrary to the position it was then taking, *De Leon-Quinones*, 588 F.3d at 754, a closer look at those opinions demonstrates that they were not truly inconsistent. In both *De Leon-Quinones*, and the case it relied on, *United States v. Bouthot*, 878 F.2d 1506, 1516 (1st Cir. 1989), there had been an identification procedure that was unnecessary and suggestive. In *De Leon-Quinones*, the witnesses had been unable to identify the defendant at trial until they saw him leaving, and then being led back into, the courtroom in handcuffs. *De Leon-Quinones*, 588 F.3d at 750-51. Because the witnesses had seen the defendant in

handcuffs, the court "assume[d] that the encounter was unnecessarily suggestive." *Id.* at 754.

In *Bouthot*, the witness had seen two of the five defendants, but he had not "provide[d] any specific details—age, height, weight," and he had been unable to identify the men from a photographic lineup. *Bouthout*, 878 F.2d at 1513. However, twenty months after he had spoken to other witnesses at the state trial, had seen "all five defendants being brought into court in handcuffs, and [had] observed the proceedings that followed," he had identified all five defendants from a photographic lineup presented by federal officers preparing for trial. *Id.* at 1514. In that case, the government "never challenged the district court's conclusions that the ... courthouse confrontations were (a) impermissibly suggestive and (b) created a 'substantial likelihood of irreparable misidentification.'" *Id.* at 1516. Therefore, neither of those cases analyzed whether there had in fact been an unnecessarily suggestive identification procedure, and even if they had, state actors had put the defendants in handcuffs and had taken them into a courtroom where they knew the witnesses were sitting, which was unnecessarily suggestive.

In contrast, in *Lopez-Lopez*, two police officer witnesses had "immediately, spontaneously, and without being prompted, identified the defendant," who was handcuffed and sitting on a bench in the police station. *Lopez-Lopez*, 282 F.3d at 11. The defendant argued that "that the police could easily have used less suggestive identification procedures and that there was no good

reason for allowing the detainees to sit on the first floor of the [police] station where [the officers] might easily see them." *Id.* In rejecting that claim, the court first found that the officers had been "unaware that specific people had been arrested" and had not anticipated seeing detainees suspected of the crime at the police station. *Id.* It then ruled: (1) that the argument was flawed because it "assume[d] that an identification was intentionally contemplated by the police," but the police "were not attempting to undertake an identification; the detainees were simply sitting downstairs"; and (2) that although the "police might have been more careful," "it was not unreasonable for them to opt against holding the suspects upstairs where the administrative offices [were] located." *Id.* Therefore, in that case, unlike in *De Leon-Quinones* and *Bouthot*, there was no unnecessarily suggestive identification procedure because the police were not attempting to get an identification and the encounter was accidental.

Similarly, in *State v. Fecteau*, 133 N.H. 860 (1991), an officer had taken the witnesses to Fecteau's probable cause hearing to see if they could identify him. *Id.* at 865. He "chose that date in order to ensure that many people would be present in the courtroom and thus reduce the risk that the two witnesses would focus unjustifiably on the Fecteau." *Id.* He also chose to wait until shortly after court was scheduled to begin to bring the witnesses to the courthouse in order to "reduce the likelihood of the women meeting Fecteau by himself in a hallway." *Id.* He intended to wait for another officer to signal him that Fecteau was in the courtroom, so he would know it

was safe to bring the witnesses inside. *Id.* However, the defendant arrived late, got out of his van in the middle of the street, and walked into the courthouse while the officer was still outside talking to the women. *Id.* The officer then tried to "unobtrusively block their view" and "distract them by continuing the conversation," but both women "saw Fecteau and later told the police that they instantly recognized him." *Id.* This Court ruled that the "encounter was plainly accidental and precisely the sort of meeting which [the officer had taken] great pains to avoid," and that "[t]he police [could] not be faulted for such an accident." *Id.* at 867; *see also United States v. Rogers*, 387 F.3d 925, 937 (7th Cir. 2004) ("courts have held accidental encounters between a witness and a suspect to be non-suggestive").

Here, the circumstances of the identification are clearly distinguishable from those in *De Leon-Quinones* and *Bouthot*, and even less suggestive than those in *Lopez-Lopez* and *Fecteau*. When Officer Clay arrived at West Hollis Street, she parked her cruiser in front of the building and walked to the parking lot. MH 8-9, 12. She then encountered the defendant carrying some of the stolen property. MH 39. He claimed that "kids" who had just left the area had stolen that property and that he was just moving it, and he provided a description of one of those kids and said that the other one would be on Ash Street. MH 10-11. He then pointed toward a man on Ash Street and said that the man had been in the parking lot. MH 11. Officer Clay spoke to that person, but he denied being involved. MH 11-12. While they were talking, the defendant "kept saying that he had just found the amplifiers and that other kids had stolen them." MH 12.

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When Officer Clay and the defendant walked back into the parking lot, Clavijo walked over and said he had found out through a neighbor that his car had been broken into. MH 12. Officer Clay asked Officer Dunn "to stay with Mr. Perry because it was an ongoing investigation and [they] needed to make sure [they] had all parties that had knowledge of the situation to remain on scene until [they] figured out what was going on." MH 13. The defendant was just standing there and he was not handcuffed or restrained in any way, MH 10-11, 14. At that time, the officer did not know that there was an eyewitness. MH 45.

Officer Clay spoke to Blandon in the hallway where neither of them could see the parking lot or the defendant. MH 14, 17. Officer Clay never pointed out the defendant to Blandon or indicated in any way that there was a suspect. MH 14. She merely asked Blandon to describe what she had seen. MH 18. Blandon then said that she had seen a tall, black man, MH 30, "walk and look into all of the cars in the parking lot and that he then circled Mr. Clavijo's car," opened the trunk, and removed a large item, MH 24-25. She also said she had seen him "carrying a bat." MH 25. Officer Clay asked for a more specific description, and Blandon said "it was the man that was in the back parking lot standing with the police officer." MH 18. As she did, "[s]he kind of went back into her apartment and pointed towards the window to show ... that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot." MH 18.

The foregoing facts clearly demonstrate: (1) that Officer Clay asked Officer Dunn to stay with the defendant

only because the defendant had information about an ongoing investigation, not because they believed he was the thief; (2) that Officer Clay was unaware that Blandon had seen the defendant standing with Officer Dunn; and (3) that neither Officer Clay nor anyone else had asked Blandon to identify a suspect or had even suggested that there was a suspect. Therefore, the officers had not "implicitly conveyed their opinion of the criminal's identity to the witness by means of [any identification procedure]." *Bell-Rogers*, 159 N.H. at 181 (quotations and citations omitted).

Further, "[t]he term 'showup' itself denotes a police procedure" because that term means "an out-of-court pretrial identification *procedure* in which a suspect *is presented* singly to a witness *for identification purposes*." *State v. Hibl*, 714 N.W.2d 194, 201 (Wis. 2006). Therefore, as demonstrated above, contrary to the defendant's claim, the identification could not have been "the product of the functional equivalent of a one-man show-up." DB 16. *Cf. Stovall v. Denno*, 388 U.S. 293, 302 (1967) (one-man show-up where the police took the defendant to the witness's hospital room), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987); *United States v. Newman*, 144 F.3d 531, 535 (7th Cir. 1998) (one-man show-up where the police brought the witnesses in separate cars to Newman's house, "which was cordoned off by yellow crime scene tape," and then brought Newman "in handcuffs to a spot approximately eight to ten yards from each car"); *State v. LeClair*, 118 N.H. 214, 218 (1978) (showing of a single photograph of the defendant to the witness "amounted to a one-man show-up").

Moreover, as demonstrated above, Blandon seeing the defendant with an officer was not intentional or preventable because the police did not know that she was in a position to see the defendant at that time. Therefore, there was no unnecessarily suggestive identification procedure because "[t]he police cannot be faulted for such an accident." *Fecteau*, 133 N.H. at 867; *see also Amadi v. Herndon*, No. CV 06-04832 GW, 2009 WL 863545 at *7 (C.D. Cal. 2009) (no identification procedures were used where the police did not orchestrate or initiate a spontaneous identification); *State v. Mitchell*, 453 So. 2d 1260, 1263 (La. Ct. App.) (no identification procedure was used where the victim noticed Mitchell at the police station and "made an unsolicited spontaneous identification" that "was independent of any police procedure"), *writ denied*, 457 So. 2d 16 (La. 1984); *cf. Stovall*, 388 U.S. at 302 (one-man show-up identification procedure was not unnecessary where "an immediate hospital confrontation was imperative" because the witness was the only person who could exonerate Stovall and it was not clear how long the witness would live (quotation and citation omitted)); *LeClair*, 118 N.H. at 218 ("showing of the photograph and the conducting of the show[-]up were unnecessarily suggestive, because there were no exigent circumstances which would justify not using less suggestive methods," and because "the police by various means indicated to [the victim] that the defendant was the one they wanted him to identify, even when he was viewing [a lineup] with four photographs").

In any event, even assuming that there had been an unnecessarily suggestive identification procedure, it did

not "render the identification unreliable and inadmissible." *State v. Cyr*, 122 N.H. 1155, 1158 (1982).

> The law is well-settled that when unnecessarily suggestive police identification procedures are used, the State must demonstrate by clear and convincing evidence, in light of the totality of the circumstances, that the identification was nonetheless reliable, based on observations uninfluenced by the suggestive procedures used by the police. The five factors indicating the reliability of the identification under this totality of the circumstances test are: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of any prior description given by the witness; (4) the witness's level of certainty at the time of the identification; and (5) the time lapse between the crime and the identification.

State v. Whittey, 134 N.H. 310, 312 (1991). "[T]he prejudicial effect of the suggestive identification is balanced against [those] reliability factors." *State v. Allard*, 123 N.H. 209, 213, *cert. denied*, 464 U.S. 933 (1983).

Here, the factors favoring reliability clearly outweighed any possible minimal suggestiveness caused by Officer Dunn merely standing with the unrestrained defendant in the parking lot. Blandon had a good opportunity to view the defendant because she watched him commit the crime in a parking lot that was lit up by lights in the parking lot, lights on the building, and streetlights on Ash Street.

MH 25-26. *See Whittey*, 134 N.H. at 313 (fact that "the area was well-lit" contributed to a finding that the witness had a good "opportunity to view" the defendant); *State v. Howe*, 129 N.H. 120, 124 (1987) (lighting conditions are a factor to be considered in determining the reliability of an identification).

Blandon also had to have paid a great deal of attention to what the defendant was doing because she described the actions he took in detail—walking around the parking lot looking into cars, circling Clavijo's car, opening Clavijo's trunk, removing a large item, and carrying a bat. MH 24, 36. Those descriptions were demonstrably accurate were Officer Clay testified that she had seen the defendant carrying the amplifiers, that Clavijo had said that two amplifiers and a large wooden box with two speakers had been taken from the trunk of his car, and that she had found the box and amplifiers near the car. MH 9-10, 30, 36-37, 39.

Further, although Officer Clay speculated that the actions described by Blandon could have taken as little as a couple of minutes to occur, she also said that there were twelve to fifteen cars in the parking lot. MH 25. Therefore, although two minutes would have been a sufficient amount of time for Blandon to have seen the defendant and accurately identified him, it was reasonable to conclude that she had watched him for an even longer amount of time.

In addition, although the defendant makes much of the fact that Blandon could not later identify him in a

photographic lineup, Blandon saw the defendant from an upstairs window, so could not have been expected to have seen his facial features clearly enough to have been able to distinguish them from those of other persons with the similar features. MH 29. Further, she described the person who she had seen as a tall, black man, MH 30, and the defendant is a black man, who is over six feet tall.[3]Therefore, "her description of [him], although lacking in some details, substantially agreed with the defendant's appearance." *Whittey*, 134 N.H. at 314; *see also State v. Heald*, 120 N.H. 319, 323 (1980) (although descriptions given by three witnesses varied in detail, they were sufficiently accurate to be reliable.).

Moreover, as demonstrated in the statement of facts, Blandon's "level of certainty at the time of identification was unequivocal." *State v. Guay*, 130 N.H. 413, 418 (1988). The identification was also made within a matter of minutes after she observed the defendant committing the offense, so the delay at issue here was "considerably shorter than the seven months the United States Supreme Court stated 'would be a seriously negative factor in most cases.'" *Howe*, 129 N.H. at 125 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). "It is unlikely that [her] recollection would fade during the period of time in question so as to render the identification unreliable." *Howe*, 129 N.H. at 125 (addressing a lapse of time of three weeks). Therefore, because there was no "substantial likelihood that there

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3. Although no testimony about the defendant's height was admitted at the suppression hearing, he testified at trial that he is 6' 2" tall, JT-II 224, and the fact that he was tall would have been obvious to the court at the suppression hearing.

was an irreparable misidentification," this is not one of those "extraordinary cases" where identification evidence should have been taken from the jury. *De Leon-Quinones*, 588 F.3d at 753 (quotation and citation omitted).

In any event, even if the identification had been the result of an unnecessarily suggestive identification procedure, and even if the identification had been unreliable, reversal is not warranted. "The mere fact that some unreliable identification testimony was received does not establish a denial of the due process right to a fair trial." *State v. Monteiro*, 110 N.H. 95, 99 (1970) (quotation and citation omitted). "The right is to be tested by assessing the totality of proof on the identification issue." *Id.* (quotation and citation omitted). Here, even if Blandon's identification should not have been admitted, the "error was harmless ... because [this Court] can say beyond a reasonable doubt that the [admission of the out-of-court identification] did not affect the verdict." *Fecteau*, 133 N.H. at 868.

At trial, Blandon was "subjected to vigorous and extended cross-examination." *Monteiro*, 110 N.H. at 99. Further, "as bearing upon the correctness of the identification the jury could find from other evidence that the defendant [was the person who had committed the offense]." *Id.* Ullon's out-of-court identification of the defendant was admitted without objection. JT-I 134-35, 137. In addition, Officer Clay saw the defendant with Clavijo's amplifiers in his hands in the parking lot, she heard him drop Clavijo's metal bat and then saw that bat behind the defendant, she found Clavijo's box and speakers

about two car lengths away from where the defendant had been standing with the amplifiers, and she found Clavijo's vice-grip wrench in the defendant's pocket. JT-I 39, 47-48, 57-58, 67-68, 79, 81, 89. Moreover, as demonstrated in the statement of facts, although "the jury was asked to decide between two different versions of the same event, the defendant impeached his own credibility ...." *State v. Hebert*, 158 N.H. 306, 317 (2009). Therefore, "[t]aken together, these circumstances leave little room for doubt that the identification was correct, even though the identification procedure employed may have in some respects fallen short of the ideal." *Monteiro*, 110 N.H. at 100 (quotation, citation, and ellipsis omitted); *see also State v. Perron*, 122 N.H. 941, 949 (1982) ("the strength of [the witness's] identification of the defendant on the night he was assaulted, plus the previous valid photographic identifications, render[ed] defense counsel's failure to seek exclusion of the corporeal identification harmless error.").

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CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,
Michael A. Delaney
Attorney General

May 4, 2010 /s/_____

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APPENDIX L — OPINION OF THE NEW HAMPSHIRE SUPREME COURT, STATE OF NEW HAMPSHIRE v. MICHAEL ADDISON, FILED OCTOBER 19, 2010

NEW HAMPSHIRE SUPREME COURT

No. 2009-048

160 N.H. 792; 2010 N.H. LEXIS 113

The State of New Hampshire v. Michael Addison

July 14, 2010, Argued
October 19, 2010, Opinion Filed

COUNSEL: *Michael A. Delaney*, attorney general (*Peter Hinckley*, assistant attorney general, *& a.*, on the brief, and *Mr. Hinckley* orally), for the State.

Richard Guerriero, public defender, of Concord, and *David M. Rothstein*, deputy chief appellate defender, of Concord, on the brief, and *Mr. Guerriero* orally, for the defendant.

JUDGES: HICKS, J. BRODERICK, C.J., and DALIANIS, DUGGAN and CONBOY, JJ., concurred.

OPINION BY: HICKS

OPINION

Hicks, J. The defendant, Michael Addison, appeals his convictions for armed robbery and being a felon in

possession of a weapon. *See* RSA 636:1 (2007); RSA 159:3 (2002). On appeal, he argues that the Superior Court (*McGuire*, J.) erred by: (1) denying his motions to continue; (2) refusing to give cross-racial identification jury instructions; (3) informing the venire that he was charged with the murder of a police officer, *see State v. Addison*, 159 N.H. 87, 977 A.2d 520 (2009); and (4) denying his motion to suppress an in-court identification. We affirm.

The following facts are not in dispute or are supported by the record. On October 10, 2006, two armed men entered El Mexicano restaurant in Manchester while a third waited in a car. The first man, later identified as Antoine Bell-Rogers, carrying a handgun, went into the kitchen of the restaurant where owner José Rodriguez and his wife, Patricia Deleon, were preparing food. He fired two shots and demanded that Rodriguez hand over the jewelry he was wearing. At the same time, the second man, wielding a knife, robbed a customer, Alexander Paz, taking his money, keys, cell phone and cigarettes.

Shortly after the robbers fled, Manchester police arrived at the scene and interviewed Rodriguez, Paz, Deleon and another witness. All provided different descriptions of the assailants. Each of the witnesses has limited English proficiency and speaks Spanish as his or her native language.

After the robbery, Detective John Patti compiled two photo arrays, selecting photos that matched the descriptions given by the witnesses. He placed the

defendant's photo in the second array, in the top row of four, third from the left.

Later that day, Patti and Officer Timothy Feliciano, a native Spanish-speaker, presented the photo arrays to Rodriguez and Deleon. The officers separated Rodriguez from the other witnesses, so that only he could hear the instructions and see the photo arrays. Feliciano translated the "Photo Line-up Witness Instructions" form from English to Spanish for Rodriguez. The instructions provided: "This group of photographs may or may not contain a picture of the person who committed the crime now being investigated... . You do not have to identify anyone... . You must make up your own mind and not be influenced by other witnesses, if any." Rodriguez acknowledged that he understood the instructions.

Initially, Rodriguez was not able to make any identification from either photo array. During a second look, however, he identified the gunman as Bell-Rogers, but did not identify the defendant. Later the same evening, Patti and Feliciano presented the photo arrays to Paz at his home. He identified the defendant.

At trial, Rodriguez testified that on the day of the robbery he went to the front counter to take an order from a new male customer. When Rodriguez went back to the kitchen, Bell-Rogers followed him and robbed him at gunpoint. Rodriguez testified that the defendant was the man at the front counter. Paz testified that he was sitting at a table near the counter when he saw two black men enter the restaurant. While he was being robbed by

one of the men, the other man went into the kitchen. He identified the defendant as the man who robbed him.

Jeff Hayes was the driver of the getaway car. Hayes wanted to rob El Mexicano restaurant because he knew that the owner wore a large expensive bracelet. At trial, Hayes testified that he, Bell-Rogers and the defendant committed the robbery together.

I. Motion to Continue

Prior to trial, the defendant moved to continue the trial, arguing that a last minute disclosure of evidence about Hayes, including his medical and criminal records and his plea agreement, prejudiced the defense. Following a hearing, the trial court denied his motion, reasoning that: "You may have more discovery to do but you've got ample time to do it in. We don't pick a jury until a week from Tuesday." On the first day of trial, the defendant again moved to continue, arguing that he had not been able to adequately prepare in light of new statements made by Rodriguez, Deleon and Paz in the days immediately preceding trial. The trial court again denied his motion, reasoning that the new statements gave the defense "plenty of fodder for cross-examination."

On appeal, the defendant argues that the denial of a continuance was an unsustainable exercise of discretion that violated his right to due process. *See* N.H. CONST. pt. I, art. 15; U.S. CONST. amend. XIV. He argues that: (1) a conviction in this case would ultimately be used to seek the death penalty in a later case; (2) there had been no prior

continuances; and (3) the need for a continuance arose from the State's last minute production of evidence. He asserts, therefore, that the trial court acted unreasonably in denying his motions. Both parties agree that our standard of review is whether the trial court committed an unsustainable exercise of discretion. Accordingly, we assume, without deciding, that this is the correct standard.

[1] We first address the defendant's claim under the State Constitution and cite federal opinions for guidance only. *State v. Ball*, 124 N.H. 226, 231-33, 471 A.2d 347 (1983). The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. *State v. Hood*, 127 N.H. 478, 481, 503 A.2d 781 (1985). We will not overturn that decision unless it is an unsustainable exercise of discretion. *Id.*; *see State v. Lambert*, 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion standard).

[2] "There are no mechanical tests to determine when due process has been violated by the denial of a continuance, but in each case the totality of the circumstances must be considered." *State v. Linsky*, 117 N.H. 866, 880, 379 A.2d 813 (1977); *see State v. Barham*, 126 N.H. 631, 640, 495 A.2d 1269 (1985); *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964) ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process."). We consider the facts as they were presented to the court at the time of the ruling. *State v. MacLeod*, 119 N.H. 480, 482, 402 A.2d 1338 (1979); *see Ungar*, 376 U.S. at 589 ("The answer must be found in the circumstances present in

every case, particularly in the reasons presented to the trial judge at the time the request is denied.").

[3] Under these circumstances, we find no unsustainable exercise of discretion in the denial of the continuances. The documents received pertained to previous prosecutions against Hayes, his plea agreement and his medical records. The defendant had eleven days to examine the new discovery and to prepare for trial. Immediately preceding trial, Rodriguez and Deleon were deposed.

The Federal Constitution offers the defendant no greater protection than the State Constitution with regard to his claims of error. *See Linsky*, 117 N.H. at 880; *Ungar*, 376 U.S. at 589. Accordingly, we reach the same result under the Federal Constitution.

II. Cross-Racial Jury Instruction

Because the victims in this case were Hispanic and the robbers were African-American, the defendant requested a cross-racial jury instruction, citing the differences in accuracy between same-race identification and cross-racial identification. The trial court denied his request, reasoning that its instructions adequately addressed the defendant's concerns. The defendant argues that the trial court unsustainably exercised its discretion because "identification was the central issue and Rodriguez's identification was suspect."

[4] Whether or not a particular jury instruction is necessary, and the scope and wording of the instruction,

are within the sound discretion of the trial court. *State v. Kousounadis*, 159 N.H. 413, 422-23, 986 A.2d 603 (2009). We review the trial court's decision for an unsustainable exercise of discretion. *Id.* at 423. To show that the trial court's decision is not sustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case. *State v. Deschenes*, 156 N.H. 71, 82, 931 A.2d 558 (2007).

The trial court gave the jury the following instruction on identification:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The State has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him.
>
> If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.
>
> Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the person who committed the

crime at the time of the crime, and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following: one, are you convinced that the [witness] had the capacity and an adequate opportunity to observe the person who committed the crime? Whether the witness had an adequate opportunity to observe at the time of the crime will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were the lighting conditions, and whether the witness had occasion to see or know the person in the past. Two, are you satisfied that the identification made by the witness after the crime was the product of his own recollection? You may take into account both the strength of the identification and the circumstances under which the identification was made. If the identification by the witness may have been influenced by the circumstances ? under which the defendant was presented to him for identification, you should scrutinize the identification with great care.

You may also consider the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant as a factor bearing on the reliability of the identification. You may also take into account that an identification made by picking the defendant out of a group of similar

individuals is generally more reliable than one which results from the presentation of the defendant alone to the witnesses. Three, you may take into account any occasion in which the witness failed to make an identification of the defendant or made an identification which was inconsistent with his identification at trial. Four, finally, you must consider the credibility of each identification witness in the same way as any other witness. Consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize the burden of -- that the burden of proof is on the State. Now, I did emphasize the burden of proof on the State extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged.

If, after examining the testimony, you have a reasonable doubt as to the accuracy of the identification of the defendant, you must find him not guilty.

[5] The trial court acted within its discretion by declining to give the cross-racial instruction. The identification jury instruction provided ample guidance to the jury on how to properly assess the identification

testimony. We find that the court sufficiently charged the jury on identification.

III. VandeBogart Instruction

On the first day of jury selection, the trial judge began the proceedings by telling the prospective jurors about the charges. She stated: "This morning we will be choosing a jury for the case of *The State of New Hampshire v. Michael Addison*. Mr. Addison is charged with armed robbery and being a felon in possession of a deadly weapon." Over the defendant's objection, the court then gave the following instruction, based upon an instruction given in *State v. VandeBogart*, 136 N.H. 107, 113-15, 612 A.2d 906 (1992):

> I will be candid with you and inform you that the defendant in this case ... has been indicted in the shooting death of Manchester Police Officer Michael Briggs in October 2006. That case has not yet been tried and the defendant's guilt or innocence in that case has not been determined.
>
> However, the defendant is presumed innocent of that charge, as he is in the present charges, unless and until the State proves his guilt beyond a reasonable doubt. The Briggs[ ] case is totally unrelated to the present charges and has nothing to do with the defendant's guilt or innocence on these charges.
>
> The reason I mention the Officer Briggs[ ] case is that it has garnered much publicity

> in local newspapers and in local radio and television broadcasts. I assume most of you have read or heard or seen something about that case, or the charges presently before the Court. The fact that you may have read, heard or seen something about the present charges or the shooting death of Officer Briggs does not in and of itself disqualify you from serving as jurors on this case.
>
> To be a fair and impartial juror does not mean that you must come into the trial with no information or impression about the defendant or the case. To be a fair and impartial juror it is sufficient if you can lay aside your preconceptions, biases or opinions and render a verdict based on the evidence presented in this court during this trial.
>
> I have been candid with you and it is imperative that you be candid with me. If you feel that you cannot put aside any impressions, opinions or biases you may have of this case or this defendant, you must tell me that.

The court then proceeded with *voir dire*, empanelling a jury.

On appeal, relying upon Part I, Articles 15, 17, and 35 of the State Constitution and the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution, the defendant contends that the *VandeBogart* instruction violated his state and federal constitutional rights to a fair

trial before an impartial jury. *See* N.H. CONST. pt. I, arts. 15, 17, 35; U.S. CONST. amends. V, VI, XIV. He asserts that these alleged errors entitle him to a new trial.

The defendant argues that the trial court erred by giving the *VandeBogart* instruction to the venire because the facts and circumstances in *VandeBogart* differed from those in this case and because *VandeBogart* was based upon flawed reasoning. We disagree.

The defendant raises essentially the same arguments as he did in *State v. Addison*, 160 N.H. 493, 8 A.3d 53 (2010), in which the trial court gave a nearly identical *VandeBogart* instruction. For the reasons stated in that decision, we find no error.

IV. In-Court Identification

The defendant asserts that the trial court erred in allowing Rodriguez's in-court identification and his testimony about the photo line-up. The defendant asserts that Rodriguez's identification and testimony were unreliable, and alleges that the admission of this evidence violated his state and federal due process rights. *See* N.H. CONST. pt. I, art. 15; U.S. CONST. amend. XIV. He further alleges a violation of Rule 403 of the New Hampshire Rules of Evidence. In support, he argues that: (1) Rodriguez did not identify the defendant five days after the robbery, but testified to the contrary at trial at variance with the testimony of two police officers; (2) Rodriguez's description of the suspect was inconsistent with Paz's; and (3) Rodriguez's identification of the defendant was influenced by media exposure, his wife and Paz.

[6] We address the defendant's claim under the State Constitution and cite federal opinions for guidance only. *Ball*, 124 N.H. at 231-33. The defendant argues that "[t]he admissibility of identification evidence over a due process objection is governed by" the *Biggers* test. *See Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The *Biggers* test requires a two-step analysis. *State v. King*, 156 N.H. 371, 373-74, 934 A.2d 556 (2007). In *King*, we articulated the analysis as follows:

> Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive. At this stage of the inquiry, the defendant has the burden of proof. Only if the defendant has met his burden must we then consider the factors enumerated in *Neil v. Biggers* ... to determine whether the identification procedure was so suggestive as to render the identification unreliable and, hence, inadmissible. At this stage of the inquiry, the State bears the burden.

Id. at 374 (quotation omitted). The trial court did not perform a *Biggers* analysis because it ruled that "[i]f state action does not cause a suggestive encounter, the *Biggers* factors are not relevant to the admissibility of an identification."

The defendant claims that the trial court erred in light of *United States v. Bouthot*, 878 F.2d 1506 (1st Cir. 1989), and *United States v. De León-Quiñones*, 588 F.3d 748 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 2361, 176 L. Ed. 2d

575 (2010). In *Bouthot*, a witness observed the defendant committing a burglary. *Bouthot*, 878 F.2d at 1513. The witness contacted the police, but could not identify the defendant. *Id.* At the original state trial, the witness spoke with members of the victim's family and other witnesses and watched the defendant being brought into court. *Id.* at 1514. Later, during a federal prosecution stemming from the burglary, the witness was shown a photo line-up and identified the defendant as the burglar. *Id.* The court excluded the evidence, reasoning that the "[state court] events were 'very suggestive'" and, therefore, in-court identification by the witness would violate due process. *Id.* In rejecting the Government's argument that "the defendant must demonstrate that there was some improper governmental action" to satisfy the first part of the *Biggers* test, *id.* at 1515, the First Circuit reasoned that:

> Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process.

Id. at 1516.

In *De León-Quiñones*, the First Circuit reiterated the rationale of *Bouthot*. *León-Quiñones*, 588 F.3d at 754. At trial, two witnesses to a robbery testified that they did not

see the robber in the courtroom. *Id.* at 750-51. During a recess, the two witnesses observed De León-Quiñones in handcuffs. *Id.* at 751. After the recess, the witnesses both took the stand again and identified De León-Quiñones as the robber. *Id.* The court assumed the identification procedure was suggestive despite the absence of state action and conducted a *Biggers* analysis. *Id.* at 754-56. The defendant urges us to adopt the First Circuit's reasoning in *Bouthot* and *De León-Quiñones*.

The State counters that adopting the rationale in *Bouthot* would be a "depart[ure] from [our] own precedents and [would] create new constitutional law." *See, e.g., State v. Rezk*, 135 N.H. 599, 601, 609 A.2d 391 (1992) ("To determine whether the out-of-court identification procedure was unnecessarily suggestive we ask whether the police have implicitly conveyed their opinion of the criminal's identity to the witness by means of the photographic display." (quotation omitted)); *State v. Allard*, 123 N.H. 209, 213, 459 A.2d 259 (stating "our inquiry in this case is whether the out-of-court identifications are the result of such improper police procedures that the in-court identification and other evidence derived from them are inadmissible"), *cert. denied*, 464 U.S. 933, 104 S. Ct. 338, 78 L. Ed. 2d 307 (1983). The State notes that *Bouthot* adopted a minority view, and contends that we should not adopt its reasoning.

[7] We decline to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all "suggestive identification procedures." *Bouthot*, 878 F.2d at 1516. Instead, we hold that the *Biggers* analysis does not apply to

a potentially suggestive out-of-court identification where there is a complete absence of improper state action.

The defendant does not allege any improper state action in the out-of-court identification procedures. He argues that the identification was suggestive due to the influence of the media and other witnesses, specifically stating:

> The search for Addison, his arrest, and the announcement of capital murder charges dominated the news in Manchester. Rodriguez admitted that he saw those stories in the newspaper and on television. He admitted he talked to news reporters about Addison. He admitted that they showed him a photo of Addison. DeLeon testified that she talked with [Rodriguez] about Addison, telling him that the picture on the news was the robber with the knife... . Paz said he and Rodriguez talked about the publicity and looked at a flyer or poster together.
>
> The publicity and conversations about Addison had a dramatic effect on Rodriguez, leading him to make the demonstrably false claim that he identified Addison in the photo line-up.

(Citations omitted.) The defendant concedes that "[t]he inescapable conclusion is that the police did not make any mistakes in [the photo array] process." Accordingly, we

do not engage in any further analysis of the out-of-court identification testimony.

[8] The majority of federal and state courts agree that an allegedly suggestive pre-trial identification must be the result of state action in order to affect the admissibility of a later in-court identification. *See, e.g., United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir. 1986) (refusing to find a due process violation where a witness had not been shown a picture of the defendant by a government agent, but rather had seen it on television), *cert. denied*, 483 U.S. 1023, 107 S. Ct. 3270, 97 L. Ed. 2d 768 (1987); *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972) (refusing to find the identification suggestive and violative of due process, reasoning that when "there is no evidence that law enforcement officials encouraged or assisted in impermissive [*sic*] identification procedures, the proper means of testing eyewitness testimony is through cross-examination"); *Green v. State*, 279 Ga. 455, 614 S.E.2d 751, 754-55 (Ga. 2005) (refusing to find the identification unduly suggestive and violative of due process because the State had no involvement in televising the defendant's arrest); *Com. v. Colon-Cruz*, 408 Mass. 533, 562 N.E.2d 797, 805 (Mass. 1990) (stating that the "crucial question" in an allegedly suggestive identification procedure "is whether any possible mistake was the result of improper procedures on the part of the Commonwealth"); *State v. Pailon*, 590 A.2d 858, 863 (R.I. 1991) (refusing to find a due process violation by an in-court identification of a witness after an allegedly suggestive identification absent state action); *State v. Reid*, 91 S.W.3d 247, 272-73 (Tenn. 2002) (finding identification testimony properly admitted

because there was no evidence of State involvement in the witness's identifications of the defendant), *cert. denied*, 540 U.S. 828, 124 S. Ct. 56, 157 L. Ed. 2d 52 (2003).

[9] The defendant does not allege any improper pretrial state action affecting the in-court identification of the defendant. Without improper state action, the *Biggers* test "does not apply to in-court identifications." *King*, 156 N.H. at 376 (quotation omitted). Instead, the proper remedy for "any alleged suggestiveness of an in-court identification is cross-examination and argument." *Id.* (quotation omitted). Here, the defendant had sufficient opportunity to cross-examine the identifying witnesses at trial.

[10] Although the First Circuit interprets the *Biggers* test to offer the defendant greater protection under the Federal Constitution than our State Constitution, First Circuit decisions are not binding upon this court even on questions of federal law. *See Martineau v. Perrin*, 119 N.H. 529, 531, 404 A.2d 1100 (1979). "This State court authority is based upon the parallel position of State and lower federal courts." *Id.* Until the United States Supreme Court has ruled on whether state action is a prerequisite to the *Biggers* test, this court and the First Circuit have parallel authority in passing on federal constitutional questions. *Id.* We hold that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action. Accordingly, we reach the same result under the Federal Constitution.

We decline to address the defendant's Rule 403 claim because the issue was not sufficiently raised or argued. *See, e.g., State v. Burke*, 153 N.H. 361, 367, 897 A.2d 996 (2006) (Broderick, C.J., concurring specially) (single paragraph argument that was an extension of a previous argument does not warrant judicial review).

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and CONBOY, JJ., concurred.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-8974

Supreme Court, U.S.
FILED
JUL 30 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Do the due process safeguards against the State's use of unreliable eyewitness identification evidence at trial apply to all identifications which arise from impermissibly suggestive circumstances and which are very substantially likely to lead to misidentification, or only to those identifications which are also the product of "improper state action"?

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Colorado v. Connelly,
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Coolidge v. New Hampshire,
403 U.S. 443 (1971) 24

Davis v. United States,
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Foster v. California,
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Gilbert v. California,
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Gonzalez v. Duenas-Alvarez,
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Illinois v. Krull,
480 U.S. 340 (1987) 24

Manson v. Brathwaite,
432 U.S. 98 (1977) ..... *passim*

Michigan v. Bryant,
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National Collegiate Athletic Assn. v. Smith,
525 U.S. 459 (1999) 34

Neil v. Biggers,
409 U.S. 188 (1972) ..... *passim*

Palmer v. Peyton,
359 F.2d 199 (4th Cir. 1966) 11

Pennsylvania Bd. of Probation & Parole v. Scott,
524 U.S. 357 (1998) 23-24

People v. Boyd,
222 Cal. App. 3d 541 (1990) 30

People v. Owens,
97 P.3d 227 (Colo. App. 2004)..... 30

People v. Padilla,
2010 Cal. App. Unpub. Lexis 8644 (Nov. 2010) .. 30

Roberts v. Galen of Va., Inc.,
525 U.S. 249 (1999) 34

Rochin v. California,
342 U.S. 165 (1952) 11

Simmons v. United States,
390 U.S. 377 (1968) ..... *passim*

Cited Authorities

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State v. Addison,
160 N.H. 792 (2010) 1, 7, 22

State v. Holliman,
570 A.2d 680 (Conn. 1990) 30

State v. Pailon,
590 A.2d 858 (R.I. 1991) 30

State v. Parker,
991 So. 2d 411 (Fla. Dist. Ct. App. 2008) 30

Stovall v. Denno,
388 U.S. 293 (1967) ..... *passim*

Townsend v. Burke,
334 U.S. 736 (1948) 11

United States ex rel. Kirby v. Sturges,
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Cited Authorities

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United States v. Jacobsen,
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United States v. Leon,
468 U.S. 897 (1984) 24

United States v. Lovasco,
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N.H. Rev. St. Ann. 634:2 (2009) 5

Cited Authorities

Page

Other Authorities

B. SCHECK, P. NEUFELD, & J. DWYER, ACTUAL INNOCENCE (2000). 18, 19

B.L. CUTLER & S.D. PENROD, MISTAKEN IDENTIFICATION: EYEWITNESSES, PSYCHOLOGY, AND THE LAW (1995). 18

Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (Harvard 2011) 18

Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) . . 18

C.A.E. Luus and Gary L. Wells, *Eyewitness Identification Confidence, in Adult Eyewitness Testimony: Current Trends and Developments* 348 (D.F. Ross, J.D. Read & M.P. Toglia, eds.) (1994) . . 21

C.R. Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RESEARCH IN SOC. PROBLEM. & PUB. POL'Y. 99 (1987) 18

Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y. & L. 3 (2001) 19

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E. Connors, T. Lundregan, N. Miller, & T. McEwan, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) ... 17-18, 19

Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAVIOR No. 1 1 (2009) 19

Gary L. Wells, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience*, 83 JOURNAL OF APPLIED PSYCHOLOGY No. 3 360 (1998) 18, 19

Gary L. Wells, E.P. Seelau, S.N. Rydell, & C. A. E. Luus, *Recommendations for Properly Conducted Lineup Identification Tasks*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223–24 (D.F. Ross, J.D. Read & M.P. Toglia, eds.) (1994) 21

INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION at 3 (2009) 20

Jennifer L. Devenport and Brian L. Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 LAW & HUM. BEHAVIOR No. 5 569 (2004) 18

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Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement at iii (1999) 19

R.C.L. Lindsay, *Confidence and Accuracy of Eyewitness Identification from Lineups*, 10 Law & Hum. Behavior No. 3 229 (1986) 21

Samuel Gross *et al.*, *Exonerations in the United States 1989 through 2003*, 95 J. OF CRIM. L. & CRIMINOLOGY 523, 530-31 (2005) 20

Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987) 20

Siegfriend Ludwig Sporer, *Steven Penrod, Don Read & Brian Cutler, Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. No. 3 315 (1995) 21

OPINIONS BELOW

The trial court order from the New Hampshire Superior Court is not published but is located at JA 82a. The New Hampshire Supreme Court order affirming the trial court ruling is at JA 9a-11a and is online at http://www.courts.state.nh.us/supreme/orders/StatevPerry.pdf. The New Hampshire Supreme Court's order refers to its published opinion in *State v. Addison*, 160 N.H. 792 (2010), which is at JA 469a-487a.

STATEMENT OF JURISDICTION

The New Hampshire Supreme Court affirmed the New Hampshire Superior Court order on November 18, 2010. The petition for a writ of certiorari was filed with this Court on February 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Facts Underlying The Motion To Suppress

The ruling to which Mr. Perry objects was made on the basis of evidence received at a pretrial hearing on his motion to suppress. At the hearing, Nashua Police Officer Nicole Clay was the only witness who testified. She stated that on August 15, 2008, at 2:53 a.m., the Nashua Police Department received a report that "a black male was trying to gain entry into vehicles located in the back parking lot of an apartment building." JA 36a-37a, 82a-83a. Officer Clay was in uniform and traveled to the parking lot in a marked police cruiser. JA 38a, 58a-59a. After arriving at the parking lot and exiting her cruiser, she heard a "metal clang" and then saw "a black man standing between two vehicles." JA 37a, 83a. The man was holding two sound system amplifiers. JA 37a. Officer Clay asked the man to put the amplifiers down and to come speak to her. JA 83a.

The man was Petitioner, Barion Perry. As instructed, Mr. Perry put the amplifiers down and walked over to Officer Clay. JA 37a-38a, 83a. Mr. Perry identified himself and spoke to the officer. JA 38a. Officer Clay did not find it necessary to handcuff or physically restrain Mr. Perry. JA 40a. Mr. Perry attempted to explain to Officer Clay that he had found the amplifiers on the ground and was "just moving them." JA 39a, 83a. Mr. Perry said he had seen two people in the parking lot. JA 39a, 83a. He described one as wearing a white t-shirt and said the other was across the street. JA 40a. Mr. Perry accompanied Officer Clay across the street to speak to the other person but that individual denied any involvement. JA 40a-41a.

As Officer Clay and Mr. Perry returned to the parking lot, they were approached by a man who said his car had been broken into. JA 42a. He identified his car, JA 42a, and later identified the items taken from his car. JA 70a. The car owner said he did not see the break-in, but his neighbor told him about it. JA 42a. Officer Clay asked another uniformed officer to stay with Mr. Perry. She left the two of them standing in the middle of the parking lot. JA 43a, 58a, 65a. The owner of the car then brought Officer Clay upstairs to the neighbor, Nubia Blandon. JA 44a.

Officer Clay spoke to Ms. Blandon at her apartment door in a hallway within the building. JA 44a, 48a. Officer Clay said the apartment was on the second or third floor. JA 43a, 49a.[1] She spoke to Ms. Blandon in the open doorway of the apartment and was not able to see out of the apartment window down to the parking lot where Mr. Perry was standing. JA 44a, 49a.

Ms. Blandon did not speak English, so the car owner translated. When questioned by Officer Clay, Ms. Blandon said she had seen someone walking in the parking lot and looking in cars. JA 48a, 55a. She was at her apartment window looking down into the parking lot when she saw the person. JA 48a-49a. She said the person circled her neighbor's car, opened the trunk, and removed a large item from the trunk. JA 55a.[2] Ms. Blandon also said the person was carrying a bat. JA 55a.

---

1. At trial Ms. Blandon said her apartment was on the fourth floor, JA 226a, but that information was not before the trial judge when he ruled on the suppression motion.

2. Officer Clay later determined that the items taken from the neighbor's car included a large pine box containing speakers and the two amplifiers. JA 70a-71a.

When asked to describe the person, Ms. Blandon said only that the perpetrator was a "tall black man." JA 48a, 61a. Although Officer Clay sought detail beyond the description of "tall black man," Ms. Blandon did not offer any other details. JA 48a, 61a-62a. Officer Clay testified at the suppression hearing that Ms. Blandon did not provide any details as to the suspect's facial features, clothing, facial hair, or any other identifying characteristics. JA 61a-62a.

Although Officer Clay did not ask Ms. Blandon to attempt to identify Mr. Perry, when the officer asked for a further description, Ms. Blandon pointed back to the window "to show that she had already looked," and said "it was the man that was in the back parking lot standing with the police officer." JA 48a-49a. Officer Clay did not "take Ms. Blandon and point out" Mr. Perry. JA 44a. In addition, Officer Clay said that she did not ask Ms. Blandon whether she had continually watched the man from the time of the theft to the time the police arrived or if she had left the window at any point. JA 62a.

Regarding the lighting conditions, though it was approximately 2:30 a.m., JA 36a, Officer Clay said the parking lot was "fairly well lit" and that the lighting was "excellent." JA 56a-58a. She said there were some lights on the building next to the parking lot and some streetlights on a nearby street, the latter being partially blocked by trees and leaves. JA 56a. However, Officer Clay acknowledged that the parking lot was large, JA 42a, that there were at least 12-15 cars in it, JA 56a, and that some parts of the lot were dark. JA 57a. Officer Clay's testimony did not describe the location of the neighbor's car in the parking lot.

After Ms. Blandon claimed to identify Mr. Perry as the perpetrator, the police arrested him. JA 84a. At a later date, the police interviewed Ms. Blandon at the police station and presented her with a photographic array containing Mr. Perry's picture. Ms. Blandon was unable to identify anyone in the photographic array. JA 59a-60a, 84a.

II. The Motion To Suppress, The Trial Court Ruling, And The Trial

Mr. Perry was charged with theft by unauthorized taking[3] (taking the items from the car) and criminal mischief[4] (damaging the car in the break-in). JA 82a. Prior to trial, he moved to suppress the evidence that Ms. Blandon had identified him to Officer Clay on the grounds that admission of the evidence at trial would violate his right to due process of law. JA 12a-17a, 82a-87a.

After hearing the testimony of Officer Clay, and considering the facts described above, the trial court found that Ms. Blandon's identification at the scene was "spontaneously given" and "without any inducement" from the police. JA 85a-86a. The court found that "Officer Clay did not manufacture the situation in order to secure an identification." JA 86a. Nor was the identification "derived from any suggestive technique employed by the police." JA 86a. The trial court recognized that the reliability of the identification was subject to question because "the parking lot was dark," Mr. Perry "was standing with a uniformed police officer in the parking lot where the crime

3. N.H. Rev. St. Ann. 637:3 (2011).

4. N.H. Rev. St. Ann. 634:2 (2009).

occurred," Mr. Perry was "the only black male in the vicinity," and Ms. Blandon was unable to pick Mr. Perry from a photographic array constructed by the police at a later time. JA 86a. Nevertheless, the trial court ruled that "because the police procedures were not unnecessarily suggestive, the identification is admissible, and the Court need not consider whether the identification was otherwise reliable." JA 87a. Thus, while Mr. Perry could attack the reliability of the identification in front of the jury, the trial court would not consider excluding the identification as unreliable where "the police procedures were not unnecessarily suggestive." JA 87a. In light of its analysis, the trial court did not make its own factual determination of the reliability of Ms. Blandon's identification of Mr. Perry. JA 82a-87a.

Mr. Perry was subsequently tried before a jury. JA 89a. Both Officer Clay and Ms. Blandon testified that on the night of the crime Ms. Blandon identified Mr. Perry as the thief. JA 173a, 219a-225a. However, Ms. Blandon did not identify Mr. Perry in court and she acknowledged that she was unable to identify Mr. Perry in the photo lineup because she "did not clearly perceive the details of his face." JA 235a. Ms. Blandon's husband and the neighbor who was the victim of the theft both testified to having seen Mr. Perry in the parking lot on the night of the crime, but neither claimed to have actually witnessed Mr. Perry take the items from the car. JA 145a-146a, 243a-244a. Mr. Perry testified on his own behalf, telling the jury, as he had Officer Clay, that he found the stolen items in the parking lot and was moving them. JA 305a-369a. At the conclusion of the trial, Mr. Perry was acquitted of the criminal mischief charge but found guilty of theft. JA 408a-409a.

III. The New Hampshire Supreme Court Order

Mr. Perry appealed his conviction to the New Hampshire Supreme Court on the grounds that the trial court wrongly denied his pretrial motion to suppress. JA 9a. He filed a brief arguing that the trial court should have found the Due Process Clause of the Fourteenth Amendment applicable to unreliable eyewitness identifications regardless of whether the identification was orchestrated by the police. JA 414a-437a. After briefs were filed by Mr. Perry and the State, the court issued an order stating that oral argument was unnecessary and affirming the trial court's denial of the motion to suppress. JA 9a-11a.

The New Hampshire Supreme Court's order noted that Mr. Perry raised the same argument that had been made in *State v. Addison*, 160 N.H. 792, 799-804 (2010), JA 10a, and that Mr. Perry relied on the same First Circuit cases cited by Addison, *United States v. Bouthot*, 878 F.2d 1506 (1st Cir. 1989), and *United States v. De León-Quiñones*, 588 F.3d 748 (1st Cir. 2009). JA 10a. The court rejected Mr. Perry's claim that due process applies even when the suggestive circumstances were not "intentionally orchestrated by the police." JA 10a-11a. The court relied on its decision in *Addison*, explaining that:

> We recently rejected this argument, however, stating: "We decline to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all 'suggestive identification procedures.' *Bouthot*, 878 F.2d at 1516. Instead, we hold that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification

> where there is a complete absence of improper state action." *State v. Addison*, 160 N.H. ___ (decided October 19, 2010).

JA 10a. Having reaffirmed this conclusion of law and upon finding that the evidence supported the trial court's determination that there was no improper police conduct, JA 10a-11a, the New Hampshire Supreme Court affirmed the denial of Mr. Perry's motion to suppress. The court did not engage in any further legal or factual analysis. Specifically, like the trial court, the New Hampshire Supreme Court did not conduct a factual analysis of the reliability of the identification. JA 11a.

SUMMARY OF ARGUMENT

The New Hampshire Supreme Court should not have required Mr. Perry to show "improper state action" as a prerequisite to his challenge of unreliable eyewitness identification evidence on due process grounds. This Court's cases require a showing of impermissibly suggestive circumstances, but have not required an additional showing that the circumstances were caused by improper state action. The additional requirement imposed by the New Hampshire Supreme Court is contrary to the rationale and operation of the due process safeguards as described in this Court's cases.

In a series of decisions between 1967 and 1977, the Court recognized that eyewitness identification evidence is uniquely susceptible to suggestion, prone to error, and resistant to correction through the normal criminal trial process. Experience and science have since confirmed the Court's findings. In light of its concerns

about eyewitness identification evidence, the Court held that "fairness as required by the Due Process Clause" obligates trial courts to adhere to certain safeguards when identification evidence arises from impermissibly suggestive circumstances. The Court further held that "reliability is the linchpin in determining the admissibility of identification testimony." The Court implemented that test by instructing lower courts to consider the totality of the circumstances, including the suggestive influence, whether the influence was necessitated by an emergency or exigency, and other factors identified by the Court, to determine whether there is "a very substantial likelihood of misidentification."

The Court explained that the admissibility of eyewitness identification evidence depends on the nature of the due process right at stake. A suspect's constitutional rights are not violated at the moment when a witness makes an unreliable out of court identification, but rather when the State offers the unreliable identification evidence during trial. Thus, while the exclusion of unreliable identification evidence may deter the police from orchestrating suggestive circumstances, deterrence is not the primary purpose of the due process safeguards. For this reason, the Court held that even if the police engage in impermissibly suggestive conduct, eyewitness identification evidence is admissible if it is reliable.

By the same token, the due process safeguards should not be construed to allow the State to claim the absence of police involvement as justification for the admissibility of identification evidence which poses a "very substantial risk of misidentification." If reliability is the rationale for allowing the State to use identifications which were

influenced by the police, then it must also be the rationale for limiting the State's use of unreliable identification evidence at trial even when the suggestive circumstances were not orchestrated by the police. The Court indicated as much when it noted both unintended influence by the police and the particular circumstances of the encounter between the witness and the suspect as potential threats to reliability.

Rather than recognizing these principles, the New Hampshire Supreme Court mistakenly employed a deterrence-based exclusionary rule by equating "impermissibly suggestive" circumstances with "improper state action." Violations of the Fourth and Fifth Amendments are subject to such an exclusionary rule which ignores reliability in favor of deterring future police misconduct. In that context, police conduct or other state action occurring outside of the courtroom is required in order to establish a constitutional claim. However, those Fourth and Fifth Amendment exclusionary rule principles have no bearing on the due process analysis of eyewitness identification evidence where reliability, rather than deterrence, is the goal, and where the violation occurs when the State offers the evidence in court.

As recognized by the trial court, Mr. Perry had strong claims regarding the suggestive circumstances and the reliability of Ms. Blandon's identification. Mr. Perry's constitutional claim deserved to be heard, especially since Ms. Blandon's out of court identification turned out to be the crucial evidence at trial. For all of these reasons, the decision of the New Hampshire Supreme Court should be vacated and the case remanded for proceedings consistent with a holding that the Due Process Clause does not

require a criminal defendant to show improper state action or intentional orchestration by the police in order to challenge the reliability of an eyewitness identification.

ARGUMENT

I. This Court Has Recognized That Due Process Requires Safeguards Regarding The Admissibility Of Eyewitness Identification Evidence Because It Is A Uniquely Unreliable Kind Of Evidence.

Under the Fourteenth Amendment, a State shall not "deprive any person of . . . liberty . . . without due process of law." The requirement of due process embodies certain core principles of fairness, [5] including the principles which limit the use of unreliable eyewitness identification evidence in criminal trials. In a series of cases from *Stovall v. Denno*, 388 U.S. 293 (1967), to *Manson v. Brathwaite*, 432 U.S. 98 (1977), this Court cited its concerns for "fairness as required by the Due Process Clause" in recognizing safeguards against the use of unreliable eyewitness identification evidence. *Brathwaite*, 432 U.S. at 113.[6]

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5. *See generally Michigan v. Bryant*, 131 S.Ct. 1143, 1162 n. 13 (2011); *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Rochin v. California*, 342 U.S. 165, 170-72 (1952); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948).

6. The Court did not say that these cases created any new principles of law. *Stovall* described the due process principles as "recognized." *Stovall*, 388 U.S. at 301 (citing *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966)). In *Brathwaite*, the Court commented that *Stovall* "did not . . . establish a new standard of due process." *Brathwaite*, 432 U.S. at 114.

Stovall was decided the same day as *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). In *Wade* the Court made extensive findings, and concluded that eyewitness identifications are particularly untrustworthy and uniquely resistant to correction at trial, with a resulting "high incidence of miscarriage of justice." *Wade*, 388 U.S. at 228. Although *Wade* dealt with the right to counsel in police lineup procedures, the Court explained in *Brathwaite* that, "The driving force behind [*Wade*, *Gilbert*, and *Stovall*], all decided the same day, was the Court's concern with the problems of eyewitness identification. Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Brathwaite*, 432 U.S. at 111-12.

The findings which gave rise to this concern explain the due process safeguards recognized in the cases leading up to and including *Brathwaite*. The Court noted that "Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress." *Id.* In this context, the witness's recollection is vulnerable to distortion or suggestion. *Wade*, 388 U.S. at 228-29. The suggestive influence may result from police procedures, but that is not necessarily so because "[t]he witness's recollection of the stranger can be distorted easily by the circumstances *or* by the later actions of the police." *Brathwaite*, 432 U.S. at 112 (emphasis added). The less detail the witness has actually observed, the more likely the witness is to be susceptible to influence. The "dangers [of suggestion or distortion]. . . are particularly grave when the witness' opportunity for observation [of the suspect] was insubstantial." *Wade*, 388 U.S. at 229.

Moreover, correction of such influence is difficult because "once a witness has picked out the accused," the witness "is not likely to go back on his word." *Id.* In those circumstances, "though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." *Id.* at 235. Thus, the Court explicitly disagreed with the view, described by Justice Black in repeated dissents, that the evaluation of eyewitness identification testimony is always a matter left to the adversary process and trial by jury. *Foster v. California*, 394 U.S. 440, 446-47 (1969); *Simmons v. United States*, 390 U.S. 377, 395-96 (1968); *Stovall v. Denno*, 388 U.S. 293, 304-06 (1967).

Finally, the Court recognized that, in addition to its unique potential for unreliability and resistance to effective challenge at trial, eyewitness identification evidence may have such a powerful effect on jurors as to make the result of the trial a foregone conclusion. "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation . . . with little or no effective appeal from the judgment there rendered by the witness – 'that's the man.'" *Wade*, 388 U.S. at 235-36. *See also Foster*, 394 U.S. at 443.

Based on the "driving force" of these concerns, *Brathwaite*, 432 U.S. at 111-12, the Court held that due process protects a criminal defendant against being convicted on the basis of eyewitness identification evidence arising from "impermissibly suggestive" circumstances if the evidence is "very substantially likely to lead to misidentification." *Brathwaite*, 432 U.S. at 116; *Neil v.*

Biggers, 409 U.S. 188, 198-99 (1972); *Coleman v. Alabama*, 399 U.S. 1, 5 (1970); *Foster*, 394 U.S. at 443; *Simmons*, 390 U.S. at 384; *Stovall*, 388 U.S. at 302.[7]

The Court said that reliability is the focus of due process in this context, and thus, "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. *See also Biggers*, 409 U.S. at 198 (the "evil" to be avoided is a very substantial likelihood of misidentification). Reliability is assessed after consideration of the "totality of the circumstances."

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7. The exact words used to describe the standard have varied slightly. The Court sometimes used the phrase "unnecessarily suggestive" and other times used "impermissibly suggestive," but it does not appear that different meanings were intended. *Brathwaite*, 432 U.S. at 99 (referred to both phrases but described the issue presented as whether an identification arising from unnecessarily suggestive procedures should be excluded without consideration of reliability); *Biggers*, 409 U.S. at 198-99 (unnecessarily suggestive); *Coleman*, 399 U.S. at 5 (impermissibly suggestive); *Foster*, 394 U.S. at 441 (unnecessarily suggestive); *Simmons*, 390 U.S. at 384 (impermissibly suggestive); *Stovall*, 388 U.S. at 302 (unnecessarily suggestive). The Court also sometimes referred to the "likelihood of *irreparable* misidentification" (emphasis added), *see, e.g.*, *Stovall*, 388 U.S at 302, but in *Biggers* the Court explained that the word "irreparable" applies in cases where the due process objection was to an in court identification deriving from an out of court identification, as opposed to testimony only describing an out of court identification, 409 U.S. at 198. Since Mr. Perry's case presents the latter circumstance, the word "irreparable" is omitted here. Lastly, some of the cases referred to a "substantial likelihood of misidentification," *see, e.g.*, *Biggers*, 409 U.S. at 201, but when the Court summarized its prior cases in *Brathwaite* it referred to a "*very* substantial likelihood of misidentification," 432 U.S. at 116 (emphasis added), so that phrase is used here.

Brathwaite, 432 U.S. at 113; *Biggers*, 409 U.S. at 199; *Stovall*, 388 U.S. at 302. Regarding the suggestive influence, trial courts were instructed to consider both the degree of suggestion and whether the suggestion was necessitated by an emergency or exigency. *Simmons*, 390 U.S. at 385 (suggestive circumstances falling short of a showup weighed against need for swift law enforcement action). Regarding the identification of the suspect by the witness, the Court identified five factors: the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the time elapsed between the observation of the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. These factors reflect the Court's concern that an excited or disturbed witness who can offer no details is particularly prone to suggestive influence. *Brathwaite*, 432 U.S. at 112; *Wade*, 388 U.S. at 229. Lastly, putting these factors together with the suggestive circumstances, the Court said that "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself." *Brathwaite*, 432 U.S. at 114.

Two cases illustrate the application of these safeguards and why police conduct is a factor in the analysis, but not a required element of a due process claim. In *Foster*, the police engaged in conduct which was clearly suggestive. The witness failed to make a positive identification of the defendant in a three person lineup where the other two men were substantially shorter than the defendant. *Foster*, 394 U.S. at 441. The police then conducted a showup, presenting the defendant to the witness one on one. The witness still said, "truthfully - I was not sure."

Id. A week later another lineup was conducted, after which the witness declared he was "convinced" of his ability to identify the defendant. *Id.* at 442. The witness also identified the defendant at trial. *Id.* This Court held that the identification evidence should have been excluded from the trial because it was "all but inevitable" that the witness would "identify petitioner whether or not he was in fact 'the man.'" *Id.* at 443 (citation omitted).

In *Biggers*, the police also conducted a showup in which the witness viewed the defendant one on one. *Biggers*, 409 U.S. at 195. This Court agreed that the showup was unnecessary but declined to hold that "unnecessary suggestiveness alone requires exclusion of the evidence." *Id.* at 198-99. The Court rejected the idea that *Foster* recognized a *per se* exclusionary rule applicable whenever unnecessary police conduct has a suggestive influence on an eyewitness. *Id.* at 198. Instead, the Court held that there is no "strict rule barring evidence of unnecessarily suggestive confrontations." *Id.* at 199. The Court explained that:

> It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But . . . the admission of evidence of a showup without more does not violate due process.

Id. at 198. Thus, upon reviewing the evidence in *Biggers* and finding the identification reliable, the Court ruled it admissible notwithstanding the showup conducted by the police. *Id.* at 201.

Together, *Foster* and *Biggers* demonstrate that although police conduct contributing to suggestive circumstances is an important factor (when it is present), it is a factor because it may have influenced the witness and the reliability of the identification, not because the creation of suggestive circumstances by the police violates the Constitution. In short, "reliability," rather than the presence or absence of some "improper" conduct by the police, "is the linchpin for determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114.

II. Experience And Science Have Verified The Court's Findings That Eyewitness Identification Evidence Is Uniquely Prone To Error, Susceptible To Suggestion, And Resistant To Correction Through The Normal Criminal Trial Process.

Because the Court has not addressed the reliability of eyewitness identification evidence since 1977, it is important to recognize that experience and science have confirmed the Court's findings in *Wade* and *Brathwaite* that eyewitness identification evidence is unique and presents dangers not equaled by other kinds of evidence. Since *Brathwaite*, numerous published studies establish that eyewitness misidentification evidence is by far the leading cause of wrongful convictions.[8] Forensic

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8. E. Connors, T. Lundregan, N. Miller, & T. McEwan, Convicted by Juries, Exonerated by Science: Case Studies in

DNA analysis in particular has demonstrated that misidentifications by eyewitnesses continue to lead to a high incidence of miscarriages of justice, as previously recognized in *Wade*. *Wade*, 388 U.S. at 228.

In a study of 250 cases in which defendants were exonerated after conviction, Professor Brandon L. Garrett stated that the "role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases)."[9] Furthermore, Professor Garrett's original study of 200 cases indicated that eyewitness misidentification evidence was the leading contributing factor to wrongful convictions and was four times more likely to contribute to a wrongful conviction than a false confession.[10]

THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); B.L. CUTLER & S.D. PENROD, MISTAKEN IDENTIFICATION: EYEWITNESSES, PSYCHOLOGY, AND THE LAW (1995); Jennifer L. Devenport and Brian L. Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 LAW & HUM. BEHAVIOR No. 5 569 (2004); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008); C.R. Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RESEARCH IN SOC. PROBLEM. & PUB. POL'Y. 99 (1987); B. SCHECK, P. NEUFELD, & J. DWYER, ACTUAL INNOCENCE (2000); Gary L. Wells, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience*, 83 JOURNAL OF APPLIED PSYCHOLOGY No. 3 360 (1998).

9. Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (Harvard 2011).

10. Garrett, *supra*, note 8, at 76.

In a Department of Justice report studying twenty-eight felony convictions subsequently overturned on the basis of DNA evidence, 85% of the convictions resulted primarily from erroneous eyewitness identifications.[11] Attorney General Janet Reno explained:

> Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.[12]

In a 2009 Innocence Project study of over 200 cases in which convicted defendants were exonerated by DNA evidence, mistaken eyewitness identifications accounted in whole or in part for 75% of the wrongful convictions.[13] Specifically, the Innocence Project found that "[o]ver 175 people have been wrongfully convicted based, in part, on eyewitness misidentification and have been later proven

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11. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y. & L. 3, 23–24 (2001).

12. Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement at iii (1999).

13. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAVIOR No.1 1, 1 (2009). *See generally* E. Connors, *supra*, note 8; SCHECK ET AL., *supra*, note 8; Wells, *supra*, note 8, *at* 360 (1998).

innocent through DNA testing."[14]

Although some scholars argue that many eyewitness misidentifications are properly discovered before or during trial—since otherwise their inherent unreliability would lead to vastly higher rates of wrongful convictions than have thus far been discovered[15] — even those scholars acknowledge that many wrongful convictions go unnoticed. As noted in a 2005 article, the greater availability of access to DNA in rape cases, the higher rate of misidentification in robbery cases as compared to rape cases (a 2:1 ratio), and the large number of robberies committed each year suggests that:

> [T]he clearest and most important lesson from the recent spike in rape exonerations is that the false convictions that come to light are the tip of an iceberg. Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless.[16]

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14. INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION at 3 (2009).

15. *See generally* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987).

16. Samuel Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. OF CRIM. L. & CRIMINOLOGY 523, 530-31 (2005).

Another study of over one thousand wrongful convictions has clarified that recall errors by witnesses are the leading cause of wrongful convictions.[17]

The danger described in *Wade*, 388 U.S at 235-36, of a witness's false confidence – the witness who has declared "that's the man" and is thereafter mistakenly convinced of the correctness of the identification – has also been confirmed by social science. Several empirical studies have shown that "eyewitnesses often seem actually to believe that their false identifications are in fact accurate identifications," demonstrating that confidence may be a very poor indicator of identification accuracy.[18] In his review of actual cases of exoneration, Professor Garrett said, "almost all of the eyewitnesses in these trials expressed complete confidence at trial that they had identified the attacker."[19]

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17. Gary L. Wells, E.P. Seelau, S.N. Rydell, & C. A. E. Luus, *Recommendations for Properly Conducted Lineup Identification Tasks*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223–24 (D.F. Ross, J.D. Read & M.P. Toglia, eds.) (1994).

18. *Id.* at 224. *See also* Siegfried Ludwig Sporer, Steven Penrod, Don Read & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. No. 3 315 (1995); C.A.E. Luus and Gary L. Wells, *Eyewitness Identification Confidence, in Adult Eyewitness Testimony: Current Trends and Developments* 348 (D.F. Ross, J.D. Read & M.P. Toglia, eds.) (1994); R.C.L. Lindsay, *Confidence and Accuracy of Eyewitness Identification from Lineups*, 10 Law & Hum. Behavior No. 3 229 (1986).

19. Garrett, *supra*, note 9, AT 63.

These recent findings validate the concerns described by the Court over three decades ago in *Wade* and *Brathwaite*. The findings on which the Court relied in those cases remain valid and the safeguards the Court recognized remain an essential part of the American criminal justice system.

III. The New Hampshire Supreme Court's Requirement Of "Improper State Action" Is Unsupported By This Court's Cases And Conflicts With The Court's Explanation Of The Rationale And Operation Of The Due Process Safeguards.

The New Hampshire Supreme Court began its analysis of Mr. Perry's claim by stating, "Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive." JA 9a. However, after finding that the police had not employed a "suggestive technique" to obtain the identification, JA 10a, the court then described a limitation not found in this Court's case law. The New Hampshire Supreme Court held that "suggestive" influences are limited to those caused by "improper state action." The court "rejected the argument" that "a suggestive scenario remains suggestive even if it is not intentionally orchestrated by the police." JA 10a. The court further stated that "the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action." JA 480a-487a; *Addison*, 160 N.H. at 799-803.

Thus, according to the New Hampshire Supreme Court, even if impermissibly suggestive circumstances produce an eyewitness identification which is very

substantially likely to lead to misidentification, due process offers no protection against the admissibility of that evidence at trial unless "improper state action" produced the identification. This ruling should be reversed because it is inconsistent with this Court's explanation of the rationale and operation of the due process safeguards and because it imposes a limitation not recognized by this Court.

A. Admissibility Is Determined By Reliability At Trial, Not By Whether Improper Police Conduct Will Be Deterred

The New Hampshire Supreme Court's requirement of "improper state action" treated the due process safeguards regarding eyewitness identification as akin to the exclusionary rule which applies to Fourth Amendment violations. In essence, the court said that where the police have not done anything wrong, there is no reason to punish the State by excluding identification evidence from the trial. By linking inadmissibility to police misconduct, the court imported Fourth Amendment exclusionary rule principles into the due process safeguards regarding identification evidence. This was a mistake because the Fourth Amendment exclusionary rule and the due process safeguards regarding identification evidence have different goals, operate differently, and address state action in completely different contexts.

The goal of the Fourth Amendment exclusionary rule is to "compel respect" for the amendment's prohibition against unreasonable searches and seizures. *Davis v. United States*, ___ U.S. ___, ___ (2011) (slip op., at 6). *See also Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524

U. S. 357, 363 (1998); *United States v. Leon*, 468 U.S. 897, 906-13 (1984); *Illinois v. Krull*, 480 U.S. 340, 347-52 (1987). "The rule's sole purpose . . . is to deter Fourth Amendment violations" by imposing the sanction of excluding evidence at trial. *Davis v. United States*, ___ U.S. ___, ___ (2011) (slip op., at 6). Thus, the rule does not apply when it would have no deterrent value. For example, the rule does not operate when the police have acted in objective good faith reliance on a warrant issued by a judge. *Leon*, 468 U.S. at 908. Similarly, the exclusionary rule does not apply to a search or seizure by a private person because there is no constitutional violation. The Fourth Amendment protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government.'" *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971).

The Fourth Amendment exclusionary rule's goal of deterrence is at odds with the reliability goal of the due process safeguards for identification evidence. Rather than looking to reliability as the linchpin for determining admissibility, the exclusionary rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis v. United States*, ___ U.S. ___, ___ (2011) (slip op., at 7). When a trial court finds that the police obtained evidence in direct violation of the Fourth Amendment, the court does not then determine admissibility by looking at whether the evidence is nonetheless reliable. To do so would undermine the goal of deterrence.

On the other hand, if an eyewitness identification is "reliable and trustworthy" it is admitted over a due process objection, even if the police orchestrated an unfair and suggestive procedure which produced the identification. *Brathwaite*, 432 U.S. at 109, 114-17 (identification deriving from unnecessary photo showup admitted in the absence of a very substantial likelihood of misidentification); *Biggers*, 409 U.S. at 199-201 (identification deriving from unnecessary police station showup admitted in the absence of risk of substantial likelihood of misidentification). This is why the Court did not accept the defendant's argument for a *per se* exclusionary rule in *Biggers*. 409 U.S. at 198-99. Deterrence is sometimes a desirable consequence of the exclusion of unreliable identification evidence on due process grounds, but reliability is the goal. *Brathwaite*, 432 U.S. at 112-13. If deterrence were the goal, evidence deriving from intentionally suggestive procedures would always be excluded, the consequence explicitly rejected in *Biggers*. 409 U.S. at 198.

The two sets of principles are also distinguished by the point in the criminal justice process at which the Constitution is violated. The Fourth Amendment is violated at the moment the police conduct an unreasonable search or seizure. Due process, however, is not violated when the police conduct an unnecessarily suggestive identification procedure, not even when the police intentionally create the suggestive circumstances. A "showup without more does not violate due process." *Biggers*, 409 U.S. at 198. Rather, the violation of due process occurs when the eyewitness identification evidence is used in court and then only if it creates a very substantial risk of misidentification.

The point finds further explanation in an opinion, cited in *Brathwaite*, which Justice Stevens wrote while on the Seventh Circuit Court Of Appeal:

> [A] showup does not itself violate any constitutional right of the suspect. Unlike a warrantless search, which may violate a constitutionally protected interest in privacy, the identification of a suspect -- whether fair or unfair -- does not necessarily affect any constitutionally protected interest of the suspect. The due process clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue, therefore, does not arise until testimony about the showup -- or perhaps obtained as a result of the showup -- is offered at the criminal trial. If that evidence is unfairly prejudicial, the trial judge may have a constitutional obligation to exclude it, or possibly to mitigate its impact by an appropriate cautionary instruction to the jury. But if a constitutional violation results from a showup, it occurs in the courtroom, not in the police station.

United States ex rel. Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975); *see Brathwaite*, 432 U.S. at 113.

For these reasons, the Court noted in *Brathwaite* that the Fourth Amendment exclusionary rule principles simply have no bearing on the due process safeguards regarding identification evidence:

> Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem.

Brathwaite, 432 U.S. at 113 n. 13.

Therefore, the error of the the New Hampshire Supreme Court was in looking for state action at the wrong point. The court required state action prior to trial at the point of the suggestive influence on the witness. The court failed to recognize that the state action which violates due process occurs later, in court, when the unreliable identification is offered as evidence by the State in its effort to deprive the defendant of his liberty.

B. The Fact That The Police Are Often Involved In A Witness's Identification Of A Suspect Does Not Establish A Rule That Due Process Is Inapplicable In Other Situations.

Most eyewitness identifications occur during police investigations. For that reason, it is not surprising that the relevant cases which have come before this Court involved identifications made during procedures conducted by police. The presence of this common fact does not mean, however, that the Court implicitly created a rule that due process only protects against unreliable identifications arising from police conduct. To the contrary, the language and reasoning in the Court's opinions show that while the police are sometimes involved in the creation of the

suggestive circumstances, their involvement is not a required element of a due process claim.

The Court made clear in *Wade* and *Brathwaite* that its primary concern was with reliability, not with the regulation of police misconduct. In *Wade* the Court said:

> We do not assume that these risks [of unfairness] are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification.

Wade, 388 U.S. at 235. For that same reason, the Court said that its concerns extended to suggestiveness which is created "unintentionally." *Id.* at 229 ("suggestion can be created intentionally or unintentionally in many subtle ways").

Brathwaite reiterated that the concerns identified in *Wade* were the basis of both the right to counsel cases and the due process cases. *Brathwaite*, 432 U.S. at 112. In addition, and most significantly here, the *Brathwaite* Court used the disjunctive "or" in referring to the source of its concerns. In describing the typical encounter between a witness and a stranger who is committing a crime, the Court said, "[t]he witness' recollection of the stranger can be distorted easily by the circumstances or by the later actions of the police." *Id.* Thus, the Court was concerned with all suggestive influences, not just those orchestrated by the police.

Finally, this recognition by the Court that suggestive circumstances are not limited to "improper police conduct" is seen in the other guiding principles set forth by the Court. The constant rule from *Stovall* to *Brathwaite* is that "a claim must be evaluated in light of the totality of the circumstances." *Simmons*, 390 U.S. at 383; *see also Brathwaite*, 432 U.S. at 113; *Biggers*, 409 U.S. at 199; *Coleman*, 399 U.S. at 4; *Foster*, 394 U.S. at 442; *Stovall*, 388 U.S. at 302. Nowhere does the Court instruct trial courts to disregard suggestive circumstances which do not involve police conduct. Similarly, the Court's summary of its case law in *Brathwaite*, and its conclusion that reliability is the linchpin in determining admissibility, do not include an exception for unreliable identifications which are not caused by the police. *Brathwaite*, 432 U.S. at 104-14.

For these reasons, while this Court's cases have happened to involve police conduct which resulted in the challenged eyewitness identification evidence, that fact is not a sound basis on which to conclude that the Court has limited the due process safeguards to those circumstances.

IV. Other Courts Make A Similar Error When They Rely On *Colorado v. Connelly*.

In decisions similar to that of the New Hampshire Supreme Court, some courts analogize to *Colorado v. Connelly*, 479 U.S. 157 (1986), to conclude that the due process safeguards against unreliable identification evidence do not apply unless the suggestive circumstances

are the product of "state action." [20] The reliance of those courts on *Connelly* is misplaced for a number of reasons.

Connelly was a confession case, not an eyewitness identification case. The defendant approached a uniformed police officer and gave an unsolicited murder confession. *Connelly*, 479 U.S. at 160. After what appeared to the police to be a valid *Miranda* waiver, the defendant gave a more detailed confession. *Id.* Unbeknownst to the police, the defendant suffered from a serious mental illness. *Id.* at 161. The defense offered expert testimony to show that, as a result of his mental illness, "the defendant's initial statement was not the product of a rational intellect and a free will." *Id.* at 162. The evidence also showed that, although the defendant understood his rights, his mental illness prevented him from waiving his rights of his own free will. *Id.* Nonetheless, since the police were unaware of Connelly's mental illness, they did not intentionally violate his rights when they took his confession or when they obtained the waiver of his *Miranda* rights. *Id.* at 165.

The Colorado Supreme Court found that use of the defendant's confession at trial would violate due process, but this Court reversed. In doing so, the Court did not discuss *Wade*, *Biggers*, *Brathwaite*, or any of the other cases addressing eyewitness identification evidence. Instead, *Connelly* was decided on the basis of the same deterrence-based exclusionary rule which applies to

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20. *See, e.g.*, *People v. Owens*, 97 P.3d 227, 234 (Colo. App. 2004); *State v. Holliman*, 570 A.2d 680, 683 (Conn. 1990); *State v. Parker*, 991 So. 2d 411, 415-16 (Fla. Dist. Ct. App. 2008); *State v. Pailon*, 590 A.2d 858, 861-63 (R.I. 1991). *See also*, *People v. Padilla*, 2010 Cal. App. Unpub. Lexis 8644 (Nov. 2010); *People v. Boyd*, 222 Cal. App. 3d 541, 574 (1990).

Fourth Amendment claims. The Court said that its cases suppressing involuntary confessions dealt with police misconduct and "focused on the crucial element of police overreaching." *Connelly*, 479 U.S. at 164. Citing both Fourth and Fifth Amendment cases, the Court repeatedly referred to "the exclusionary rule" applicable to violations of those amendments. The Court noted that the "exclusionary rule imposes a substantial cost on the societal interest in law enforcement" and said that the "purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Id.* at 166. Thus, as in the Fourth Amendment cases, the *Connelly* holding centered on deterrence, in contrast to the Court's eyewitness identification cases which disavowed deterrence as the primary goal. *Brathwaite*, 432 U.S. at 109-13; *Biggers* 409 U.S. at 196-99.

Connelly also states that a defendant has no due process interest in a determination of the reliability of a confession before it is submitted to the jury. *Connelly*, 479 U.S at 167. According to the Court, the confession of a mentally ill defendant "might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . not by the Due Process Clause of the Fourteenth Amendment." *Id.* Likewise, regarding the *Miranda* waiver, the Court said that its rulings regarding voluntariness of a confession have "nothing to do with the reliability of jury verdicts." *Id.* at 168. Thus, the inquiry regarding involuntary confessions from mentally ill defendants is entirely different from the inquiry in the eyewitness identification cases where this Court's rule for determining admissibility focuses on reliability in order to avoid misidentification during jury

trials. *See, e.g., Biggers*, 409 U.S. at 198 (the "primary evil" to be avoided is misidentification). In addition, as described above, this Court explicitly disagreed with Justice Black's dissents in which he asserted that the rules of evidence and the trial process provide sufficient protection against unfairness in the use of eyewitness identification evidence. *Foster*, 394 U.S. at 446-47; *Simmons*, 390 U.S. at 395-96; *Stovall*, 388 U.S. at 304-06.

In the same vein, the *Connelly* Court made no findings regarding the general reliability of confessions given by mentally ill defendants. The Court said, "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed . . . ." *Connelly*, 479 U.S. at 167. The Court rejected that invitation because it would require "a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Id.* at 165-66. Nor did the Court credit reports, research, or studies which examined whether mentally ill defendants gave false confessions. In these respects, again, *Connelly* differs from *Wade* and *Brathwaite*, where the Court made extensive findings based on research which it described at length, and then based its holdings on those findings. *Brathwaite*, 432 U.S. at 112; *Wade*, 388 U.S. at 228-35. It also differs from *Biggers* which counsels courts to look at the mental state of a witness insofar as degree of attention, level of certainty, and the effects of any suggestive influence. *Biggers*, 409 U.S. at 199.

Regarding the point at which the constitutional violation occurred, the Colorado Supreme Court held that the Due Process Clause was implicated because "sufficient

state action was present by virtue of the admission of the confession into evidence." *Connelly*, 479 U.S. at 165. This Court rejected that analysis because it "failed to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Id.* at 165. Yet, as described above with regard to eyewitness identification evidence, the Court holds that there is no constitutional violation at the moment when suggestive circumstances influence an eyewitness. Rather, the violation of due process occurs when the State uses the evidence at trial. *Brathwaite*, 432 U.S. at 113 n. 13; *Biggers*, 409 U.S. at 198.

Therefore, an analogy to *Connelly* is misplaced. *Connelly* deals with involuntary confessions from mentally ill defendants, a category of evidence the Court has not declared to be unique or so prone to causing miscarriages of justice as to warrant special protection. Most importantly, *Connelly* rejects reliabilty as a factor whereas this Court's identification cases declare it to be the guiding principle. In addition, as set forth in *Connelly*, the rule of exclusion applicable to confessions focuses on police conduct and is based on deterrence. In all of these respects, *Connelly* offers no guidance for interpreting this Court's eyewitness identification cases which focus on reliability with the aim of avoiding the risk of misidentification at trial.

V. There Are Good Reasons To Doubt Ms. Blandon's Identification Of Mr. Perry As The Thief She Saw From Her Apartment Window.

Mr. Perry recognizes that this Court does not normally consider factual claims which have not been addressed by the lower courts.[21] Thus, he does not ask the Court to rule on the reliability of Ms. Blandon's identification. He only seeks a ruling in his favor on the question of law presented and, thereafter, a remand. Nevertheless, it is important to note that his motion to suppress raised a significant issue regarding the reliability of Ms. Blandon's identification.

From her apartment window in the middle of the night, Ms. Blandon watched someone commit a theft from her neighbor's car. JA 48a-49a, 55a. She was never able to offer a description of the perpetrator other than that he was tall and a black man. JA 48a, 61a. She could not describe either the perpetrator's clothes or his face. JA 61a-62a. She then identified Mr. Perry as he stood alone with a police officer in what was, in effect, an accidental showup. Here again, she was looking from her window, down into the parking lot. JA 48a-49a. Later, when presented with a proper photo lineup, Ms. Blandon did not identify Mr. Perry, JA 59a-60a, a fact she explained at trial by saying that she did not clearly see his face. JA 235a. Thus, although not orchestrated by the police, Ms. Blandon's identification from her apartment window at night presents the kind of identification which this Court

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21. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007); *Nat'l Collegiate Athletic Ass'n. v. Smith*, 525 U.S. 459, 469–70 (1999); *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253–54 (1999) (per curiam); *United States v. Bestfoods*, 524 U.S. 51, 72–73 (1998).

recognized is prone to error, namely an identification not based on a detailed description and made under the suggestive influence of apparent suspicion. *See Wade*, 388 U.S. at 229.

Furthermore, the identification was critical evidence at Mr. Perry's trial. The jury acquitted Mr. Perry of breaking into the car but convicted him of theft for taking items from the trunk. JA 408a-09a. Ms. Blandon testified that she saw the perpetrator take items from the trunk but she did not see him break into the car. JA 213a-14a, 227a. She was the only witness who claimed to have seen the theft which neither her husband nor the car owner saw. JA 145a-46a, 243a-44a. Moreover, her out of court identification of Mr. Perry to Officer Clay at the scene of the crime was only link between her observation of the perpetrator and Mr. Perry. Ms. Blandon was not asked to identify Mr. Perry at trial. Thus, without the evidence of her out of court identification, the jury may well have found the evidence lacking as to the theft charge, as it did with regard to the criminal mischief charge.

Considering these circumstances, the failure of the trial court and the New Hampshire Supreme Court to allow Mr. Perry to challenge the identification evidence on due process grounds was a significant error which should not stand.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court vacate the decision of the New Hampshire Supreme Court and remand his case for proceedings consistent with a holding that the Due Process Clause does not require a criminal defendant to show improper state action by the police in order to challenge the admissibility of an identification arising from suggestive circumstances.

Respectfully submitted,

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In The Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

On Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the New Hampshire Supreme Court correctly determined that the admission at trial of a pretrial identification cannot violate due process where no improper state action has caused the circumstances under which the identification was made.

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STATEMENT OF THE CASE

Following a jury trial in the New Hampshire Hillsborough County Superior Court for the Southern Judicial District, the petitioner was convicted of one class B felony count of theft by unauthorized taking, which was subject to an extended term of imprisonment because he had two prior convictions for theft by unauthorized taking and one prior conviction for burglary. JA 96a, 408a.[1] *See* N.H. Rev. Stat. Ann. § 637:3 (2007); N.H. Rev. Stat. Ann. § 637:11, II(b) (2007). The court sentenced him to serve three to ten years in the New Hampshire State Prison. JA 415a, 439a.

A. The Evidence At The Suppression Hearing

At 2:53 a.m. on August 15, 2008, Officer Nicole Clay from the Nashua, New Hampshire Police Department was sent to the back parking lot at 70½ West Hollis Street to investigate "a report about a black male looking through vehicles and attempting to gain entry into vehicles." JA 36a-37a. When she arrived at the multi-story apartment building, she parked her cruiser out front and walked around the building. JA 37a-38a, 42a. There were twelve to fifteen cars in the parking lot, which was "fairly well lit" by lights in the parking lot, lights on the back of the building, and

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[1] "JA" refers to the joint appendix.
"PB" refers to the petitioner's brief.

streetlights on Ash Street, which was the street at the exit to the parking lot. JA 56a.

As Officer Clay entered the parking lot, she heard what "sounded like a metal bat hitting the ground," and she then saw the petitioner carrying two amplifiers and walking toward her from between two vehicles. JA 37a-38a. She asked him to put the amplifiers down and come talk to her, so he did. JA 37a-38a. He said that he was moving the amplifiers because he had just found them on the ground. JA 39a. Officer Clay asked where they had come from, and the petitioner said "that he had just seen a couple of kids leaving the parking lot," that one of them was wearing a white T-shirt, and that the other one was on Ash Street. JA 39a-40a.

Officer Clay walked with the petitioner to Ash Street, where the petitioner pointed out a man who was standing outside a nearby house. JA 40a-41a. The man said that his name was Rowley Anzani, that he had been in the house all night, that he had just come outside to do something for his mother, that his friend had left half an hour earlier, and that he had not seen anyone else on Ash Street in the last ten minutes. JA 41a. While Officer Clay was talking to Anzani, the petitioner kept interjecting "that he had just found the amplifiers and that other kids had stolen them." JA 41a.

When Officer Clay and the petitioner returned to the parking lot, Alex Clavijo walked over and said that his neighbor had told him that someone had

broken into his car. JA 42a. He also said that the amplifiers the petitioner had been carrying and a large wooden box with two speakers mounted inside had been taken from his car. JA 70a-74a. By then, Officer Robert Dunn had arrived, so Officer Clay asked him to wait with the petitioner while she went inside to talk to Clavijo's neighbor. JA 43a. The petitioner was just standing talking to Officer Dunn in the middle of the parking lot; he was not handcuffed or otherwise restrained. JA 40a, 43a, 49a, 57a-58a, 65a.

Clavijo and Officer Clay went up to the second or third floor apartment of Clavijo's neighbor, Nubia Blandon, who came out and spoke to them in the hallway. JA 42a-44a, 48a, 66a. Blandon spoke only Spanish, so Clavijo translated. JA 44a, 67a. Officer Clay did not tell Blandon that there was a suspect in the parking lot with an officer, and they could not see the parking lot from the hallway. JA 44a, 48a, 80a. Blandon said that she had seen a tall, black man walk through the parking lot, look into all the cars, circle Clavijo's car, and then open the trunk of Clavijo's car and remove a large box. JA 48a, 55a, 61a.[2] Blandon also said that the man had been carrying a bat. JA 55a, 75a. Officer Clay asked for a description of that man, and Blandon said "it was the man that was in the back parking lot standing with the police officer." JA 48a. As Blandon spoke, she "pointed towards the

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[2] Although the hearing transcript uses the word "truck" several times, the items were taken from the "trunk" of Clavijo's car. JA 280a-81a.

window to show [Officer Clay] that she had already looked out the window to see [the petitioner] and Officer Dunn standing in the parking lot." JA 49a. Officer Clay did not ask Blandon how long she had been watching the petitioner, but it would have taken at least a few minutes for him to take all of the actions that Blandon had described. JA 62a-63a.

At some point, Blandon's husband, Joffre Ullon, who had called in the initial report about a man trying to break into cars, returned from getting coffee. JA 50a, 54a, 80a-81a. He told Officer Clay that he had seen "a black male walking through the parking lot and lifting up on the [car] door handles." JA 54a. Officer Clay asked him for a description, and he also said "it was the man standing outside with the police officer." JA 55a. Officer Clay went back outside and saw that the petitioner and Officer Dunn had moved to the end of the lot, which was about thirty feet away and not as well lit. JA 57a, 58a. She then found Clavijo's wooden box and speakers in the parking lot. JA 74a. When Blandon was shown a photographic array a month later, she was unable to identify the petitioner. JA 59a-60a.

B. Other Evidence From The State's Case At Trial

Blandon watched the petitioner for over half an hour before Officer Clay arrived. JA 216a-17a. After Officer Clay arrived, Blandon left the window and went to tell Clavijo that someone had broken into his

car. JA 216a-18a. She then returned to her window to watch what was going on. JA 216a. When she saw Officer Clay and Clavijo coming upstairs, she waited at her door. JA 222a.

In the meantime, Ullon had gone downstairs and had seen the petitioner walking around the cars in the parking lot. JA 238a. As Ullon was driving out of the parking lot, he saw a bicycle near the exit and then he saw the petitioner standing nearby in an area that was well lit. JA 238a, 247a. The petitioner turned around and hid his face. JA 238a, 247a. Ullon then drove back into the parking lot through the front entrance to try to get a closer look, but the petitioner saw the headlights and hid behind some cars. JA 238a-39a, 245a. Ullon later returned from getting coffee, saw the petitioner in the parking lot with Officer Dunn, and then went upstairs and spoke to Officer Clay. JA 196a, 241a.

Blandon and Ullon were later separately shown a photograph lineup containing a photograph of the petitioner. JA 283a-91a. Blandon could not identify the petitioner's photograph because she had not "clearly perceive[d] the details of his face." JA 235a. Ullon had not seen the petitioner's features clearly, but he still "recognized his face," JA 245a-46a, and "immediately" picked out the petitioner's photograph, JA 290a.

C. Relevant Events Before, During, And After Trial

Prior to trial, the petitioner moved to suppress Blandon's out-of-court identification pursuant to the due process clauses of the state and federal constitutions. JA 12a-17a (citing U.S. Const. amends. V, XIV; N.H. Const. pt. I, art. 15). He argued, in relevant part: (1) that the identification procedure had been "unnecessarily suggestive" because Blandon had identified the petitioner only after she had seen the police cruisers, and had seen the petitioner being arrested and put in handcuffs by police officers, JA 15a-16a; and (2) that Blandon's identification had not been reliable. JA 16a. Accordingly, argued the petitioner, under *Neil v. Biggers*, 409 U.S. 188 (1972), the court had to exclude the identification. The State objected, arguing, in relevant part: (1) that no due process analysis was required because "Blandon's identification of the [petitioner] was not facilitated by the police in any fashion," JA 24a, and because the circumstances were not unnecessarily suggestive, JA 26a; and (2) that the circumstances of the identification demonstrated that it had in fact been reliable, JA 27a-28a.

At a hearing on the motion, the petitioner confirmed that he was not moving to exclude Ullon's identification. JA 51a-53a. He also argued, among other things, that there was sufficient state action present to warrant a due process analysis. JA 76a, 78a. The State argued that there was no unnecessarily suggestive state action because the police had neither

known that Blandon was watching nor done anything to suggest that they wanted her to identify the petitioner. JA 76a-78a. The Hillsborough County Superior Court for the Southern Judicial District ruled that "Blandon's identification of [the petitioner] was not derived from any suggestive technique employed by the police," JA 86a, so it "need not consider whether the identification was otherwise reliable," JA 86a-87a.

At trial, defense counsel said in her opening statement that the case was "about the wrong identification, an inaccurate identification. . . ." JA 113a. Blandon was then extensively cross-examined about the facts that she was watching a person in the parking lot from a window on the fourth floor, that her view was partially blocked by a van, JA 226a, that she could not describe the color of the bicycle the person was riding, JA 233a, that she could not describe the person's clothing or facial features, JA 233a-34a, and that she was unable to pick the petitioner out of a lineup, JA 235a. Blandon's out-of-court identification was admitted at trial, JA 173a, but she was not asked to make an in-court identification of the petitioner.

Ullon's out-of-court identification was also admitted, without objection, at trial. JA 242a-43a, 245a-46a, 285a-87a. Defense counsel then argued in closing that the petitioner was being tried only because there had been "an incomplete investigation" and "a wrong ID," JA 374a, and that the out-of-court identifications by Ullon and Blandon were unreliable and had come about only after the police had provided them with "powerful" context clues, JA 374a-75a.

The petitioner appealed his conviction to the New Hampshire Supreme Court, arguing for the first time that no state action was required to trigger a due process analysis. JA 425a. The New Hampshire Supreme Court did not address the State's preservation, reliability, and harmless error arguments. JA 9a-11a. Instead, it "decline[d] to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all 'suggestive identification procedures,'" and held "'that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action.'" JA 10a (quoting *State v. Addison*, 160 N.H. 792, 801, 8 A.3d 118, 125 (2010), *cert. denied*, 131 S. Ct. 2444 (2011)). The state court then found that "[b]ecause the evidence support[ed] the trial court's finding that [the petitioner] failed to carry his burden of proof on the first step of the *Biggers* analysis," improper state action, "[it] need not consider the second step," reliability. JA 10a-11a.

SUMMARY OF ARGUMENT

The New Hampshire Supreme Court correctly concluded that the Due Process Clause of the Fourteenth Amendment does not require that all identification evidence must be deemed reliable before it is admissible in a criminal trial. Instead, as the New Hampshire Supreme Court held, identification evidence needs to be deemed reliable only in cases where the police obtained the challenged evidence as the

result of an improper—that is, unnecessarily suggestive—procedure.

I. The Due Process Clause of the Fourteenth Amendment guarantees a fair trial for all criminal defendants. Despite its broad goals, however, the Clause has been construed narrowly. When confronted with a fair trial claim, this Court has stated that its analysis is largely circumscribed by the protections contained in the Bill of Rights. *Dowling v. United States*, 493 U.S. 342, 352 (1990). By limiting the Due Process inquiry to whether there was a violation of specific constitutional rights, this Court has sought to avoid the expansion of constitutional guarantees under the "open-ended rubric of the Due Process Clause," a circumstance that could invite "undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1992).

There is no specific constitutional right that requires evidence to be deemed reliable before it is admissible in a criminal trial. In fact, in *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), this Court held that reliability was "a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." It also emphasized that the Due Process Clause was not concerned as much with the potentially, "presumptively false" nature of the evidence at issue as it was with preventing "fundamental unfairness in the use of evidence, whether true or false." *Id.* (quotation omitted).

Accordingly, although the Due Process Clause of the Fourteenth Amendment may be a source of ensuring fundamental fairness, it does not accomplish that end by imposing a special constitutional requirement that witnesses must be adjudged reliable before they may testify.

While the Due Process Clause of the Fourteenth Amendment does not require that evidence be deemed reliable before it is admissible, many other provisions of the Constitution, especially those contained in the Sixth Amendment, ensure that the decision in a criminal case is the product of a fair procedure based upon reliable evidence. For example, the rights to confrontation, cross-examination, counsel, compulsory process, proof beyond a reasonable doubt, and a jury trial all serve to guarantee a just verdict.

II. In *Stovall v. Denno*, 388 U.S. 293 (1967), this Court issued the first of a series of decisions dealing with due process challenges to testimony about an eyewitness's identification of the accused. Those decisions required this Court to confront the problem of the State or the Government using evidence at trial that it had obtained through an identification procedure that may have manipulated or influenced the witness's ability to recognize the perpetrator of a crime. *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). By the time that those decisions were rendered, the use of manipulated evidence by the prosecution had long been recognized as a due process violation. *See, e.g.*, *Lisenba v. California*, 314 U.S. 219, 237 (1941). Accordingly, when the police or prosecution engaged

in such improper manipulative conduct, the Court needed to decide the circumstances, if any, under which identification evidence could nonetheless be admitted at trial. It decided that such improperly influenced identification evidence would be admissible only if it was reliable, a determination that was to be made based upon the consideration of five factors. *See, e.g., Brathwaite*, 432 U.S. 113-14.

Viewed in that light, *Stovall* and the cases that followed did not represent or signal a departure from the general proposition that the Due Process Clause of the Fourteenth Amendment does not require courts to make a preliminary reliability determination before a witness may testify at trial. Instead, the *Stovall* line of cases signaled that where the State's improper conduct manipulated or tainted a witness's identification of a criminal defendant, testimony about that identification had to be deemed reliable before it would be admissible. Because *Stovall* and its progeny rested the due process analysis upon the possibility that the government was seeking to use manipulated identification evidence, it follows that government action—an unnecessarily suggestive identification procedure—must be involved before the reliability inquiry will be triggered.

III. The New Hampshire courts correctly applied the principles discussed in the *Stovall* line of cases. That is, the state courts correctly concluded that they did not need to perform a reliability analysis because the police did not conduct a suggestive and unnecessary identification procedure. The witness identified

the petitioner at a time when she was not even asked to do so. She identified him after an officer merely asked for a description of the man that she had seen breaking into cars outside her apartment building. Accordingly, the witness identified the petitioner as the perpetrator of the theft not because of anything the police did. Rather, he was identified because an eyewitness watched him perpetrate the crime and then reported her observations to a police officer.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT GUARANTEE THAT ONLY RELIABLE WITNESSES BE ALLOWED TO TESTIFY AT CRIMINAL TRIALS.

The Due Process Clause of the Fourteenth Amendment guarantees a fair trial for all criminal defendants. *Lisenba v. California*, 314 U.S. 219, 236 (1941). Its "aim . . . is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Id.* Fundamental unfairness occurs when there "is conduct that shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). The New Hampshire Supreme Court held that it does not offend due process to allow a jury to hear and evaluate evidence of an out-of-court identification of a criminal defendant, where the police did not orchestrate or conduct a procedure that led to the identification. JA 10a-11a. Because

juries routinely decide the reliability and weight to be given evidence, *see, e.g.*, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), and because many other constitutional protections ensured that the verdict in the petitioner's case was the product of a fair process, the New Hampshire Supreme Court's decision did not result in an unfair, unreliable, or conscience-shocking trial. The petitioner's conviction should be upheld.

A. The Due Process Clause Protects Against State Action That Violates Fundamental Conceptions Of Justice; It Does Not Impose A Requirement That Evidence Must Be Found Reliable Before It Is Admitted At Trial.

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." Nothing in the plain meaning of those words dictates that trial courts are required to make preliminary reliability determinations before witnesses may offer testimony generally, or identification testimony particularly. The petitioner does not argue otherwise in his brief. Nor does he ground his claim for relief in colonial or English custom or practice. Instead, he asserts that this Court over time has interpreted the Due Process Clause to require such preliminary determinations. *See, e.g.*, PB 11-17. It has not.

"The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the

Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions." *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009) (quotation omitted). It requires the State "to observe that fundamental fairness essential to the very concept of justice," *Lisenba*, 314 U.S. at 236, and to honor "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." *Rochin*, 342 U.S. at 169.

While those principles may at first seem broad, this Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly" and has cautioned that

> [j]udges are not free, in defining "due process," to impose on law enforcement officials their personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. They are to determine only whether the action complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.

Dowling v. United States, 493 U.S. 342, 352 (1990) (quotations, citations, ellipses, and brackets omitted) (addressing a challenge under the Due Process Clause of the Fifth Amendment); *see Medina v. California*, 505 U.S. 437, 443 (1992) (noting that "the states have considerable expertise in matters of criminal procedure," and that the procedures through which the

states administer the criminal law are "not subject to proscription under the Due Process Clause" unless they offend principles of justice so rooted in the "traditions and conscience of our people as to be ranked fundamental" (quotation omitted)); *Rochin*, 342 U.S. at 168 (similar).

When courts decide whether particular actions transgress fundamental conceptions of justice, their inquiry is a limited one, largely circumscribed by the Bill of Rights, which "speaks in explicit terms to many aspects of criminal procedure." *Medina*, 505 U.S. at 443; *see Dowling*, 493 U.S. at 352 ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."); *Bute v. Illinois*, 333 U.S. 640, 678-79 (1948) (*Douglas*, J., dissenting) ("The basic requirements for fair trials are those which the framers deemed so important to procedural due process that they wrote them into the Bill of Rights and thus made it impossible for either legislatures or courts to tinker with them."). A limited inquiry is necessary because "the expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443. Accordingly, in the absence of a violation of the rights contained in the Bill of Rights, a fair trial claim is unlikely to succeed because "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where

the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *United States v. Augenblick*, 393 U.S. 348, 355 (1969) (citations omitted).

Actions that violate fundamental conceptions of justice occur, for example, when a criminal defendant is forced to appear for his jury trial while wearing identifiable prison clothing, *see Estelle v. Williams*, 425 U.S. 501, 503-06 (1976), when criminal defendants are routinely required to wear visible shackles during jury trials, *Deck v. Missouri*, 544 U.S. 622, 627 (2005), when the prosecution knowingly withholds material and exculpatory evidence from the defense, *Brady v. Maryland*, 373 U.S. 83, 86 (1963), when the prosecution knowingly offers perjured testimony that the factfinder relies upon to convict a criminal defendant, *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935), when a jury is placed in the custody of deputy sheriffs who are also witnesses for the prosecution, *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), when the court refuses to instruct the jury concerning the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978), or when the court fails to protect a criminal defendant against inherently prejudicial media coverage that demonstrably affects the jury venire and turns a trial into a "carnival" and "bedlam," *Sheppard v. Maxwell*, 384 U.S. 333, 355, 358 (1966). The common thread in each of these cases is that state action undermined the fundamental fairness of the trial. That is, in each case, the criminal defendant

suffered prejudice because state action interfered with the jury's ability to decide the case fairly. Significantly, in none of those cases did this Court hold that the due process clauses require trial courts to screen evidence for indicia of reliability.

And in fact, this Court has expressly rejected the argument that due process imposes a *per se* requirement that evidence or the testimony of witnesses must be deemed reliable before it is admissible in court.[3] In *Connelly*, 479 U.S. at 167, for example, the Court held that the Due Process Clause of the Fourteenth Amendment was not concerned with the reliability of a defendant's confession. There, the issue was whether the trial court was required, under the Due Process Clause, to exclude the confession of an arguably insane man who approached the police and admitted that he had murdered a woman several months earlier. *Id.* at 161-62. This Court acknowledged that the defendant's confession "might be proved to be quite unreliable," but decided that reliability was "a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." *Id.* at 167. It also emphasized that the Due Process Clause was not concerned as much with

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[3] Evidentiary rules—as opposed to constitutional provisions—may, however, require preliminary reliability determinations. *See, e.g.*, Fed. Rs Evid. 403, 702, 802; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (under the Federal Rules of Evidence, a trial judge should ensure that scientific evidence is reliable).

the potentially, "presumptively false" nature of the evidence at issue as it was with preventing "fundamental unfairness in the use of evidence, whether true or false." *Id.* (quotation omitted).

The Court confirmed that due process does not govern the reliability of testimony in *Dowling v. United States*, 493 U.S. at 345, where it held that the reliability of a witness's testimony was an issue for the jury to decide. There, the defendant was acquitted of charges arising from a home invasion. *Id.* But, during a subsequent trial for bank robbery, the victim of the home invasion was allowed to testify during the Government's presentation of evidence. *Id.* at 344-45. The defendant contended that admitting the victim's testimony amounted to a due process violation because "evidence relating to acquitted conduct is inherently unreliable." *Id.* at 345. This Court flatly rejected that assertion, leaving the issue of reliability to the jury, which "remained free to assess the truthfulness and the significance of [the victim's] testimony" and to weigh that assessment against whatever evidence the defendant may have offered when he had the "opportunity to refute it." *Id.* The Court also noted that the rules of evidence adequately protected the defendant against potential abuse. *Id.* at 352-53.

Both *Connelly* and *Dowling*, thus, rejected the position that due process requires evidence to be deemed reliable before it is admissible. Instead, reliability is to be resolved under the rules of evidence and by the trier of fact. Taken together, *Connelly* and *Dowling* compel the conclusion that while the Due

Process Clause of the Fourteenth Amendment may be a source of ensuring fundamental fairness, it does not accomplish that end by imposing a special or additional constitutional requirement that witnesses must be adjudged reliable before they may testify. Instead, under the Fourteenth Amendment, "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

There is no reason for the principles discussed in *Connelly* not to apply here. The parallels between that case and the instant one are strong. In *Connelly*, the police obtained the evidence at issue while in the process of investigating a murder. But they neither violated any party's constitutional rights nor deliberately tried to manipulate any evidence. So it was here. The police learned of the petitioner's identity while investigating a theft. But they did not violate his or Blandon's constitutional rights in the process. Nor did they try to manipulate Blandon or suggest an answer to her. In fact, quite to the contrary, Blandon pointed out the petitioner in response to the officer's request that she simply describe him. JA 48a-49a. So, Blandon's identification of the petitioner was not even responsive to the question that the officer had posed. Accordingly, just as the jury was left to resolve the issue of the reliability or accuracy of Connelly's statement to the police, so too should the jury here have been left to decide the correctness of Blandon's

identification. And that was essentially the effect of the New Hampshire Supreme Court's decision.[4]

B. Other Provisions Of The Constitution Safeguard The Reliability Of Criminal Trials.

Although the Due Process Clause of the Fourteenth Amendment does not require that evidence be deemed reliable before it is admissible, that result

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[4] Not surprisingly, therefore, the New Hampshire Supreme Court's decision rests comfortably within the majority view. *See, e.g.*, *United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir. 1986); *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972); *United States v. Venere*, 416 F.2d 144, 148 (5th Cir. 1969); *State v. Nordstrom*, 25 P.3d 717, 729 (Ariz. 2001); *People v. Owens*, 97 P.3d 227, 233 (Colo. Ct. App. 2004); *Sheffield v. United States*, 397 A.2d 963, 966-67 (D.C. 1979); *Semple v. State*, 519 S.E.2d 912, 914 (Ga. 1999); *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993); *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985); *State v. Birch*, 956 So. 2d 793, 800 (La. Ct. App. 2007); *State v. Naoum*, 548 A.2d 120, 124-25 (Me. 1988); *Wood v. State*, 7 A.3d 1115, 1119-21 (Md. Ct. Spec. App. 2010); *Commonwealth v. Sylvia*, 921 N.E.2d 968, 976 (Mass. 2010); *Tidwell v. State*, 784 S.W.2d 645, 647 (Mo. Ct. App. 1990); *People v. Marte*, 912 N.E.2d 37, 39 (N.Y. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); *State v. Brown*, 528 N.E.2d 523, 532-33 (Ohio 1988); *State v. Pailon*, 590 A.2d 858, 863 (R.I. 1991); *State v. Reid*, 91 S.W.3d 247, 272 (Tenn. 2002); *Rogers v. State*, 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003); *cf. United States v. Boykins*, 966 F.2d 1240, 1243 (8th Cir. 1992) (witness's identification was properly admitted where she "spontaneously recognized" a co-defendant "without any suggestion from the government"). *But see Thompson v. Mississippi*, 914 F.2d 736, 739 (5th Cir. 1990).

does not mean that the Constitution is unconcerned with the reliability of evidence in criminal proceedings. Quite to the contrary, many other provisions of the Constitution ensure that the decision in a criminal case is the product of a fair procedure based upon reliable evidence. In fact, this Court recognized that very point in *Strickland*, 466 U.S. at 684-85, emphasizing that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment. . . ." *See Washington v. Texas*, 388 U.S. 14, 18 (1967) (this Court has "increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law").

Consistent with that principle, this Court has held that due process requires that the accused be confronted with the witnesses against him, that he have the assistance of counsel for his defense, that he be given a speedy trial, and that he have the right to compulsory process for obtaining witnesses in his favor. *Id.* Each of these rights bears directly upon, or allows a defendant to demonstrate, the reliability, or lack thereof, of particular testimony or evidence. *See, e.g., Doggett v. United States*, 505 U.S. 647, 655 (1992) ("Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."); *Washington*, 388 U.S. at 19 (the right to compulsory process allows a

defendant to put his own version of the facts before the jury "so it may decide where the truth lies").

For example, a criminal defendant's right to confrontation ensures the reliability of evidence by allowing him to test a witness's account through cross-examination. *Crawford v. Washington*, 541 U.S. 36, 55, 62 (2004); *see Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) ("Confrontation is one means of assuring accurate forensic analysis."); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (cross-examination "assures the accuracy of the truth-determining process" (quotation omitted)). Confrontation represents the Framers' considered "judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined," namely "by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61; *see id.* at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2725 (2011) (*Kennedy*, J., dissenting) ("The protections in the Confrontation Clause, and indeed the Sixth Amendment in general, are designed to ensure a fair trial with reliable evidence.").

In practical terms, confrontation allows a defendant to expose testimony as false or as the product of an incompetent witness. *Melendez-Diaz*, 129 S. Ct. at 2537. For example, when confronted at trial, an

"eyewitness who has fabricated his account to the police, [or an] analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* And even if nothing so dramatic occurs, a defendant is still able to use cross-examination to expose any number of weaknesses in the State's identification evidence: that the eyewitness was far away, that it was dark, that the eyewitness had a vision problem or was not wearing his eyeglasses, that the events unfolded quickly, that the eyewitness looked away for a period of time, or that the eyewitness harbored a bias. Each such fact would influence the weight, if any, that would be given to the State's evidence. Further, such circumstances are common fodder for cross-examination regardless of whether the witness is identifying an accused as the perpetrator of a particular crime or more generally recounting events that he or she observed.[5]

A criminal defendant's right to counsel also ensures that he has the opportunity to meaningfully

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[5] Sylvia Crawford, whose out-of-court testimony was at issue in *Crawford*, was an eyewitness. That is, although she was not identifying the perpetrator, she did describe the events that had occurred and implicated her husband in criminal conduct. *Crawford*, 541 U.S. at 39, 65. In its recitation of the facts, this Court noted that "Sylvia at one point told the police that she had 'shut [her] eyes and . . . didn't really watch' part of the fight, and that she was in shock." *Id.* at 66. Her testimony was, thus, potentially unreliable. But the solution to that problem was not to have a trial judge make a preliminary assessment of it. Instead, under the Sixth Amendment, the solution was to require cross-examination.

contest the reliability of the evidence against him. As the Court stated in *Nix v. Williams*, 467 U.S. 431, 446 (1984), "[t]he Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination." *See United States v. Cronic*, 466 U.S. 648, 656 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."); *see generally Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (emphasizing importance of right to counsel to ensure fair trial). Indeed, the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Cronic*, 466 U.S. at 655 (quotation omitted).

The defendant's right to a jury trial also provides a means of addressing the reliability of evidence by placing in the hands of the accused's peers the determination of whether the witnesses for and against him are to be believed. In *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968), this Court traced the historical roots of the right to a jury trial in the United States. It explained that the "[j]ury trial came to America with English colonists, and received strong support from them." *Id.* at 152. The Framers of the Constitution granted the right to a jury trial

> to criminal defendants in order to prevent oppression by the Government. Those who

> wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Id. at 155-56. Thus, the jury was seen as the means by which the charges against an accused were evaluated against whatever evidence the prosecution had marshaled. *See United States v. Booker*, 543 U.S. 220, 244 (2005) (the Sixth Amendment right to a jury trial protects the "interest in fairness and reliability"); *Herring v. New York*, 422 U.S. 853, 863 n.15 (1975) ("the collective judgment of the jury tends to compensate for individual short-comings and furnishes some assurance of a reliable decision" (quotations omitted)). Importantly, that evaluative process has been considered reliable. Citing "the most recent and exhaustive study of the jury in criminal cases," this Court explained that juries are able to "understand the

evidence and come to sound conclusions." *Duncan*, 391 U.S. at 157.[6]

Another means by which the Constitution ensures the reliability of the evidence presented in a criminal trial is through the requirement that alleged unlawful conduct be proved beyond a reasonable doubt. The beyond a reasonable doubt standard of proof "plays a vital role in the American scheme of criminal procedure, because it operates to give concrete substance to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quotations omitted). "[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Id.* In other words, by requiring "near certitude," the beyond a reasonable doubt standard of proof compels the factfinder to carefully and rationally assess witness testimony so that a deprivation of life or liberty does not rest upon uncertain,

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[6] This Court has been wary of arguments based upon a "general distrust . . . of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case. . . ." *Spencer v. Texas*, 385 U.S. 554, 565 (1967) (discussing the use of evidence of prior convictions). *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally.").

unreliable, or otherwise inadequately supported or developed evidence.

These many means of testing the reliability of Blandon's identification of the petitioner were on full display here. The petitioner was brought to trial less than eight months after he was indicted. JA 1a, 5a. He was represented by counsel, who ably and vigorously cross-examined Blandon and the officer to whom Blandon had made the identification. JA 203a-06a, 225a-35a. The petitioner presented his version of events by testifying in his own behalf. JA 313a-69a. Further, the trial court correctly instructed the jury concerning the beyond a reasonable doubt standard of proof. JA 395a-96a. And it also gave the jury a special instruction concerning the evaluation of "identification testimony." JA 399a-401a.

The inclusion within the Bill of Rights generally, and the Sixth Amendment particularly, of these many means of testing the reliability of evidence undermines the petitioner's argument that the Due Process Clause of the Fourteenth Amendment requires a pretrial, judicial assessment of an eyewitness's identification testimony. Simply put, the Constitution already has time-tested mechanisms for that type of evaluation. *Connelly* and *Dowling* are two cases that necessarily rest upon a recognition of the importance and value of such mechanisms. This Court should rely upon the principles underlying those cases to hold that while the Due Process Clause of the Fourteenth Amendment plays an important role in ensuring the fairness of criminal proceedings, it does not do so by

imposing a constitutional requirement that the testimony of witnesses be deemed reliable by a judge before it is admissible at trial. *Cf. Crawford*, 541 U.S. at 67 (cautioning against replacing a procedure mandated by the Constitution with one of the Court's "devising").

II. THIS COURT HAS NOT CONSTRUED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE THAT ALL IDENTIFICATION EVIDENCE OBTAINED THROUGH SUGGESTIVE PROCEDURES BE DEEMED RELIABLE BEFORE IT IS ADMISSIBLE AT TRIAL.

In *Stovall v. Denno*, 388 U.S. 293 (1967), this Court issued the first of a series of decisions dealing with due process challenges to testimony about an eyewitness's identification of the accused. Those decisions required this Court to confront the problem of the State or the Government using at trial evidence that it had obtained through an identification procedure that may have manipulated or influenced the witness's ability to recognize the perpetrator of a crime. *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). By the time that those decisions were rendered, the use of manipulated evidence by the prosecution had long been recognized as a due process violation. *See, e.g., Lisenba*, 314 U.S. at 237 ("If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has

been denied due process of law."); *Holohan*, 294 U.S. at 112 (due process is offended when the state deliberately presents perjured evidence); *cf. Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing improper comments by a prosecutor and stating that "although the State is obliged to prosecute with earnestness and vigor," it "is as much its duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one" (brackets omitted)). Accordingly, when the police or prosecution engaged in such improper manipulative conduct, the Court needed to decide the circumstances, if any, under which identification evidence could nonetheless be admitted at trial. It decided that such improperly influenced identification evidence would be admissible only if it was reliable. *Brathwaite*, 432 U.S. at 113-14.

Viewed in that light, *Stovall* and the cases that followed did not represent or signal a departure from, or an exception to, the general proposition that the Due Process Clause of the Fourteenth Amendment does not require courts to make a preliminary reliability determination before a witness may testify at trial. Instead, *Stovall* and its progeny signaled that where the State's conduct manipulated or tainted a witness's identification of a criminal defendant, testimony about that identification had to be deemed reliable before it was admitted at trial. *See Brathwaite*, 432 U.S. at 113-14; *see also Lisenba*, 314 U.S. at 236 (the "aim of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the

use of evidence, whether true or false"). To have held otherwise would have been to allow the State to derive an unfair advantage at trial from its improper, pretrial conduct.

Each of the cases in the *Stovall* line involved identifications whose reliability was attacked by the defense because of the identification procedure set up by the police. In analyzing whether the identification evidence was admissible, this Court engaged in two inquiries: Was there anything improper about the police's conduct? And if so, should the identification nonetheless be admitted?

For example, in *Stovall* itself, the defendant was presented to the victim in handcuffs in the hospital room where she was recovering from the major surgery that was required to save her life after the defendant had stabbed her eleven times. *Stovall*, 388 U.S. at 295. During this identification procedure, the defendant was surrounded by five officers and two members of the district attorney's staff, and was the only black person in the room. *Id.* This Court held that the state's conduct did not violate due process, however, because "an immediate hospital confrontation was imperative" since it was uncertain whether the victim would survive. *Id.* at 302. After finding no improper conduct, this Court made no mention of the reliability of the identification in its due process analysis.

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the defendant was identified when the police

showed photographs, including the defendant's, to employees of a bank that had been robbed the previous day. *Id.* at 380-82. The Court acknowledged "that improper employment of photographs may sometimes cause witnesses to err in identifying criminals," and that such a

> danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.

Id. at 383. Despite those "hazards of initial misidentification," however, this Court upheld the admission of the identification evidence at issue, noting that identification by photograph had "been used widely and effectively in criminal law enforcement," and that any "danger that the use of the technique may result in convictions based on misidentification [could be] substantially lessened by a course of cross-examination at trial, which exposes to the jury the method's potential for error." *Id.* at 384.

In *Foster v. California*, 394 U.S. 440 (1969), this Court found that the police procedure involved—two lineups, in which the defendant was the only person in both, and a suggestive showup—was unnecessarily

suggestive and unreliable; thus, the identification was inadmissible. *Id.* at 442. The Court stated,

> The suggestive elements in this identification procedure made it all but inevitable that David would identify [the defendant] whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "This is the man." This procedure so undermined the reliability of the eyewitness identification as to violate due process.

Id. at 443.

In *Coleman v. Alabama*, 399 U.S. 1, 4 (1970), this Court rejected a claim of unnecessary suggestiveness where a shooting victim identified the defendant from a six-person lineup conducted at the local police station. Importantly, for purposes of the instant case, the plurality in *Coleman* specifically noted that "the record [was] utterly devoid of evidence that anything the police said or did prompted [the witness's] virtually spontaneous identification of petitioners among the lineup participants as the proceeding got underway." *Id.* at 6 (although Coleman was the only man in the lineup who was wearing a hat, "nothing in the record show[ed] that he was required to do so").

In *Neil v. Biggers*, and in *Brathwaite*, this Court considered "whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and

unnecessary."[7] *Brathwaite*, 432 U.S. at 99; *see Neil v. Biggers*, 409 U.S. 188, 199 (1972). In *Biggers*, 409 U.S. at 194-95, the police conducted a showup identification seven months after the crime. In *Brathwaite*, 432 U.S. at 101, the identification was made after one officer, relying upon the identifying officer's description, left a photograph of the defendant in the identifying officer's office. In both cases, although the police procedure was improper—that is, unnecessary and suggestive—this Court upheld the admission of the identification evidence because it was reliable. *Id.* at 116; *see Biggers*, 409 U.S. at 198-201. In *Brathwaite*, this Court specifically stated that it was "content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116.

And finally, in *Watkins v. Sowders*, 449 U.S. 341, 345-46 (1981), this Court considered whether the Due Process Clause required trial courts to make preliminary determinations, outside the presence of the jury, concerning the admissibility of identification evidence. At issue there were two pretrial identifications of the defendant as the person who had committed an

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[7] *Biggers* answered this question with respect to identification evidence obtained before *Stovall* was decided. *Biggers*, 409 U.S. at 199. *Brathwaite* dealt with identification evidence obtained after *Stovall*. *Brathwaite*, 432 U.S. at 109.

armed robbery of a liquor store. *Id.* at 342. One witness made the identification through a showup; the other made it through a lineup; both were conducted by the police. *Id.* at 342-43. In concluding that a preliminary determination was not necessary in every case, this Court emphasized that "cross-examination ha[d] always been considered a most effective way to ascertain truth," that "the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform," and that "the *only* duty of a jury in cases in which identification has been admitted will often be to assess the reliability of that evidence." *Id.* at 347, 349.

Based upon this Court's reasoning in all of the cases in the *Stovall* line, at least three related points emerge. First, those cases cannot stand for the proposition that identification evidence is a special type of evidence that generally is so dubious that it must always be evaluated by a judge before it is introduced to a jury. *See* PB 17. That proposition would undermine this Court's repeated insistence that only evidence derived from unnecessarily suggestive procedures will be subjected to a reliability determination. And it would be inconsistent with a point that this Court recognized in *Brathwaite* and *Watkins*:

> While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process. Counsel

> can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Brathwaite, 432 U.S. at 113 n.14 (quotation omitted); *see Watkins*, 449 U.S. at 348.

Second, *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, *Brathwaite*, and *Watkins* cannot stand for the proposition that all suggestive identifications must be submitted to a judge for a reliability determination before trial. Certainly, the showup in *Stovall* was suggestive—he was the only black man in the room and he was accompanied by an entourage of policemen and prosecutors. But this Court did not require reliability as a condition of admissibility there. Instead, it focused upon the necessity of the procedure. So, any argument that all suggestive identifications must be subjected to a pretrial reliability determination is an argument that *Stovall* should be overruled and that this Court should ignore its repeated emphasis upon the need for the identification procedure to be both suggestive and unnecessary, before the five reliability factors will apply. The petitioner has not pointed to any case law that would justify such a sweeping proposition.

Third, *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, *Brathwaite*, and *Watkins* cannot have been premised upon the proposition that the Due Process

Clause of the Fourteenth Amendment requires preliminary reliability assessments of all potentially untrustworthy evidence, for that proposition is counter to cases like *Connelly* and *Dowling*. It is also inconsistent with the aim of the Due Process Clause, which "is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba*, 314 U.S. at 236. Instead, the *Stovall* line of cases should be viewed as consistent with the rest of this Court's Due Process jurisprudence which, as explained earlier, focuses upon whether the government has taken actions that deprive a defendant of a fundamentally fair trial.

Since there is no broadly applicable constitutional requirement that conditions admissibility upon a pretrial assessment of reliability, *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, and *Brathwaite*, must have been driven by some other due process concern. Because this Court's opinions in those cases repeatedly focused upon the dangers of police misconduct during the identification procedure, *see*, *e.g.*, *Brathwaite*, 432 U.S. at 111-12; *Foster*, 394 U.S. at 442-43; *Simmons*, 390 U.S. at 383; *Stovall*, 388 U.S. at 298-99, the inescapable conclusion is that the due process concern at issue was whether the State or the Government was manipulating identification evidence and then using it at trial. *See*, *e.g.*, *State v. Nelson*, 260 S.E.2d 629, 648 (S.C. 1979) ("In effect, when police manipulate suggestive elements of an identification procedure to convince a witness that 'there is the man,' the reliability of the witness' subsequent identification of

the defendant in court can be so undermined as to violate due process."). Such a conclusion finds support in the fact that by the time *Stovall* was decided, the use of improperly obtained evidence had long been considered a due process violation. *See, e.g., Lisenba*, 314 U.S. at 237 ("If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law."). Seen in that light, *Stovall* and its progeny represented an effort to strike "the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." *Kirby v. Illinois*, 406 U.S. 682, 691 (1972).

Case law discussing the applicability of the Sixth Amendment right to counsel during identification procedures supports the conclusion that this Court harbored concern about the use of prosecution-manipulated identification evidence. For example, in *United States v. Wade*, 388 U.S. 218, 236-37 (1967), decided the same day as *Stovall*, this Court held that the defendant was entitled to the assistance of counsel at a post-indictment lineup. It emphasized the "degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification," and pointed out that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more

such errors than all other factors combined." *Id.* at 229 (brackets and quotation omitted); *see id.* at 235 ("The fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way.").

In *Moore v. Illinois*, 434 U.S. 220, 229 (1977), this Court held that the defendant was entitled to counsel during a corporeal identification procedure conducted as part of a pretrial hearing. It emphasized that the police could "suggest, intentionally or unintentionally, that they expect the witness to identify the accused," and that such a suggestion "coming from a police officer or prosecutor" could "lead a witness to make a mistaken identification." *Id.* at 225. The Court also noted that counsel could intervene to stop "suggestive features of a procedure before they influence[d] a witness' identification." *Id.*

And in *United States v. Ash*, 413 U.S. 300, 312 (1973), this Court again referred to the "opportunities for prosecuting authorities" to take advantage of identification procedures through "suggestive influences." It concluded, however, that the Sixth Amendment did not require that defense counsel be able to attend a meeting between a witness and the prosecution during which a photographic array was used. *Id.* at 321. The Court left open the possibility that any

identification that took place during such a meeting could be excluded on due process grounds. *Id.* at 318 n.11. It also noted that any identification conducted by the defense could be excluded if it was the product of an improper identification procedure. *Id.* The latter circumstance, of course, would not be a matter of due process, for the Fourteenth Amendment does not create a constitutional basis upon which the State may challenge a defendant's conduct; it guards against certain state action. U.S. Const. amend. XIV, § 1. But, by noting the possibility of excluding identification evidence obtained by the defense, *Ash* further demonstrates that this Court's concern with identification evidence was that it could be manipulated by a party and then introduced at trial to the prejudice of one side or the other in a criminal case.

Because *Stovall* and its progeny rested the due process analysis upon the possibility that the government was seeking to use manipulated identification evidence, it follows that government action must be involved before the protections outlined in those cases will be triggered. That is, it is only when there is government conduct—an unnecessarily suggestive identification procedure—that the test for reliability set out in *Biggers* and *Brathwaite* will apply. The New Hampshire Supreme Court reached that conclusion, and it was correct.

In urging a contrary result, the petitioner relies in part upon a portion of *Brathwaite* which provides that "reliability is the linchpin in determining the admissibility of identification testimony." PB 14

(quotation omitted); *see* PB 28. *See also United States v. Bouthot*, 878 F.2d 1506, 1516 (1st Cir. 1989); *Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998) (relying upon that language); *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986) (same). Both the petitioner and these courts, however, have wrenched that passage from *Brathwaite* out of context. *Brathwaite*, 432 U.S. at 99, involved "*a police procedure* that was both suggestive and unnecessary." (Emphasis added.) Its statement that "reliability is the linchpin" addressed when testimony *tainted by a suggestive police procedure* may be admitted. Besides, in *Stovall*, this Court did not even discuss reliability. So, reliability cannot, contrary to the petitioner's claims, be the linchpin of admissibility for all suggestive identification procedures. What the reliability inquiry represents is a threshold that the State must overcome in order to admit identification evidence that its agents obtained through procedures that were unnecessarily suggestive and, hence, manipulative. *See Brathwaite*, 432 U.S. at 112 (balancing the need to deter the police from using unnecessarily suggestive procedures and the need to ensure that reliable evidence is not unnecessarily withheld from the trier of fact).

The petitioner also devotes several pages of his brief to arguing that the New Hampshire Supreme Court "imported Fourth Amendment exclusionary principles into the due process safeguards regarding identification evidence." PB 23-27. Pointing to the state court's reference to "improper state action," the petitioner seems to assert that the court relied too

heavily upon a Fourth Amendment deterrence-type rationale which, he says, is inconsistent with the reliability inquiry that this Court discussed in *Biggers* and *Brathwaite*. PB 23; JA 10a.

Nothing in the New Hampshire Supreme Court's opinion suggests that its reference to "improper state action" was based upon a misunderstanding about the nature of a due process claim under the Fourteenth Amendment. The state court did not cite the Fourth Amendment. JA 9a-11a. Nor in any obvious way did it base its opinion upon Fourth Amendment principles or a deterrence rationale. Instead, by referring to "improper state action," the New Hampshire Supreme Court recognized that a successful due process claim will exist only when the State unfairly uses identification evidence that it obtained through impermissible, manipulative means.

At bottom, the petitioner is asking this Court to deem identification evidence a special type of evidence that is entitled to its own reliability rules—mandated by the Due Process Clause of the Constitution, no less. But, as noted earlier, he has not identified any text in the Constitution that requires identification evidence to be treated differently. Nor has he pointed to any colonial or English custom that would suggest that such identification evidence should be singled out for special, constitutional rules regarding reliability. And there is no basis in logic for such a distinction. Either the Due Process Clause forbids the introduction of unreliable evidence or it does not. *Connelly* and *Dowling* correctly say that it does not.

In urging a contrary conclusion, the petitioner relies heavily upon the results of studies conducted by social scientists to argue that identification evidence is generally unreliable. PB 17-22. The problem with that argument is that, as explained earlier, this Court's case law, from *Stovall* to *Brathwaite*, was not based upon reliability. Instead, it was based upon the State's or the Government's use of potentially manipulated evidence at trial. To the extent that the petitioner's arguments implicate state evidentiary rules or undermine the weight that identification evidence is assigned by the trier of fact in some cases, such rules and special jury instructions adequately address the concerns that he has raised. *See, e.g.*, *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972) (setting forth a model jury instruction on eyewitness identification evidence); *People v. Marte*, 912 N.E.2d 37, 40-41 (N.Y. 2009) (discussing the application of state rules of evidence and the possible use of expert testimony regarding eyewitness identification), *cert. denied*, 130 S. Ct. 1501 (2010). In light of these extant safeguards, there is no need for this Court to require a broad constitutional rule in their stead. *See District Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009) ("[j]udicial imposition of a categorical [rule] . . . might pretermit other responsible solutions being considered in Congress and state legislatures").

The bottom line is that the Due Process Clause of the Fourteenth Amendment does not contain a broad

constitutional requirement that all evidence be deemed reliable before it is admissible. Rather, the rights to confrontation, counsel, compulsory process, a jury trial, and proof of the allegations beyond a reasonable doubt, among others, remain the means by which the Constitution enables a criminal defendant to test the reliability of the State's evidence and thereby achieve a just and fair verdict. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

III. BECAUSE THE POLICE DID NOT EMPLOY AN UNNECESSARILY SUGGESTIVE IDENTIFICATION PROCEDURE, THERE WAS NO REASON TO CONDUCT A PRETRIAL RELIABILITY ASSESSMENT.

The New Hampshire courts correctly applied the principles discussed in *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, and *Brathwaite*. That is, the state courts correctly concluded that they did not need to perform a reliability analysis because the police did not conduct "a suggestive and unnecessary identification procedure." *Brathwaite*, 432 U.S. at 106.

As the petitioner forthrightly concedes in his brief, the police did not conduct an identification procedure at all. PB 34 ("Thus, although not orchestrated by the police, Ms. Blandon's identification from her apartment window at night presents the kind of

identification which this Court recognized is prone to error. . . ."). To explain, when Officer Clay arrived at West Hollis Street, she parked her cruiser in front of the building and walked to the parking lot, where she encountered the petitioner carrying some of the stolen property. JA 37a-38a, 41a-42a, 72a-73a. He pointed toward a man on Ash Street and said that the man had been in the parking lot. JA 40a. Officer Clay went over and spoke to the man, but he denied involvement in the thefts. JA 41a.

When Officer Clay returned to the parking lot, Clavijo approached her and said that his neighbor, Blandon, had told him that someone had broken into his car. JA 42a. Officer Clay then decided to go and speak with Blandon. Before leaving, she asked Officer Dunn "to stay with Mr. Perry because it was an ongoing investigation and [they] needed to make sure [they] had all parties that had knowledge of the situation . . . remain on scene until [they] figured out what was going on." JA 43a, 79a-80a. After Officer Clay left, the petitioner stood with Officer Dunn. JA 43a. He was not handcuffed or restrained in any way. JA 40a, 43a.

Officer Clay spoke to Blandon in the hallway of her apartment building, where neither of them could see the parking lot or the petitioner. JA 44a, 48a. Officer Clay never pointed out the petitioner to Blandon or indicated in any way that he was a suspect. JA 44a, 49a. She merely asked Blandon to describe what she had seen. JA 48a. In response, Blandon said that she had seen a tall, black man, JA 61a, "walk and

look into all of the cars in the parking lot and that he then circled Mr. Clavijo's car," opened the trunk, and removed a large item, JA 55a. She also said that she had seen him "carrying a bat." JA 55a. Officer Clay asked for a more specific description of the man, and Blandon said "it was the man that was in the back parking lot standing with the police officer." JA 48a. As Blandon spoke, "[s]he kind of went back into her apartment and pointed towards the window to show . . . that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot." JA 49a.

Under these circumstances, far from identifying the defendant as the result of some police-orchestrated procedure—let alone an unnecessarily suggestive one—Blandon pointed out the petitioner at a time when she was not even asked to do so. That is, she identified him after Officer Clay merely asked for a description of the man whom she had seen lurking in the parking lot and taking items from Clavijo's car. A responsive answer to that question would have consisted of additional details about the petitioner's physical characteristics or other traits. Accordingly, the petitioner was identified as the perpetrator of the theft not because of anything the police did. Rather, he was identified because he had the misfortune that an eyewitness watched him perpetrate the crime and then reported her observations to a police officer.

In light of the facts outlined above, the trial court supportably found, and the New Hampshire Supreme Court agreed, that the identification evidence at issue

was not "derived from any suggestive technique employed by the police." JA 86a; *see* JA 10a. Because the police did not conduct an identification procedure, the New Hampshire Supreme Court correctly concluded that the protections set forth in *Biggers* and *Brathwaite* did not apply. In the alternative, because the state courts supportably found that any procedure was not unnecessarily suggestive, there was no need to decide whether Blandon's identification of the petitioner was reliable. *Brathwaite*, 432 U.S. at 106. On either or both of those bases, the decision of the New Hampshire Supreme Court should be affirmed.

In conclusion, the verdict in the petitioner's case was the product of a fair trial during which he exercised many of the constitutional rights that have been discussed in this brief. For example, he was represented by counsel, who ably and vigorously cross-examined Blandon and the officer to whom Blandon had made the identification. JA 203a-06a, 225a-35a. Defense counsel pressed the identification issue in her opening statement, arguing that the case was "about the wrong identification, an inaccurate identification. . . ." JA 113a. Defense counsel then raised the identification issue again in closing argument, asserting that the petitioner was being prosecuted because of incorrect and unreliable identification evidence. JA 374a-75a. In addition, the petitioner presented his version of events by testifying in his own behalf. JA 313a-69a. Finally, the trial court correctly instructed the jury concerning the beyond a reasonable doubt standard of proof, JA 395a-96a, the presumption of

innocence, JA 395a, and the evaluation of "identification testimony" in particular, JA 399a-401a.

Under these circumstances, a properly instructed jury weighed the evidence that was presented at a trial during which both parties were vigorously represented by able counsel. It then reached a verdict. The Constitution requires nothing more.[8]

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[8] Should this Court reverse the judgment of the New Hampshire Supreme Court, the respondent reserves the right, on remand, to raise preservation issues, to contend that any error in admitting the identification evidence was harmless, and to argue that the identification was reliable, all of which are arguments that the respondent advanced in its brief to the state court. JA 452a-53a, 463a-67a.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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REPLY BRIEF

RECORD AND BRIEFS

No. 10-8974

IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

REPLY BRIEF

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INTRODUCTION

Barion Perry challenged the suggestive eyewitness identification evidence in his case on due process grounds and according to principles long recognized by this Court. Contrary to the arguments of Respondent and the United States, Perry did not and does not advocate for a new rule or a change in the law. Specifically, Perry does not argue that all unreliable evidence should be inadmissible as a matter of due process. Rather, Perry objects to the New Hampshire Supreme Court decisions which grafted a new requirement of "improper state action" onto this Court's holdings. Neither the New Hampshire Supreme Court's opinions, nor the arguments offered by Respondent and the United States, are supported by this Court's case law. Thus, the lower courts improperly refused to consider Perry's due process claim. This Court should grant relief so that Perry's claim may be heard.

Perry replies to the briefs of Respondent and the United States as follows:

ARGUMENT

I. This Court's Cases Do Not Support The Manipulated Evidence Argument Offered By Respondent And The United States.

In an effort to show that improper police conduct is a prerequisite to due process protection, Respondent and the United States argue that this Court's identification cases were only intended to address suggestive circumstances created by police "manipulation." Respondent's brief repeatedly identifies "manipulation" as the core concept

of this Court's decisions. Resp. Br. 10, 11, 19, 28, 29, 36, 39-42. Respondent claims that "the inescapable conclusion is that the due process concern at issue was whether the State or the government was manipulating identification evidence and then using it at trial." Resp. Br. 36. Similarly, the United States claims that, in *United States v. Wade*, 388 U.S. 218 (1967), the Court was focused on whether the police could "manipulate the lineup to suggest that a certain person is the perpetrator of the crime." U.S. Br. 10. Thus, the United States concludes that, "In every one of the decisions addressing due process limitations on eyewitness identification testimony, the Court was motivated by concerns that police would fashion procedures that would suggest to a witness that a particular suspect was the perpetrator, which could lead the witness to choose the wrong person." U.S. Br. 14.

The manipulated evidence argument is premised on decisions written decades before the eyewitness cases. Respondent says that, "by the time of" *Stovall*, "the use of manipulated evidence by the prosecution had long been recognized as a due process violation." Resp. Br. 28. In support of that point, Respondent cites *Lisenba v. California*, 314 U.S. 219 (1941), *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Berger v. United States*, 295 U.S. 78 (1935). Resp. Br. 28-29. *See also* U.S. Br. at 22-24. Respondent quotes *Lisenba* to the effect that such manipulation is similar to "fraud, collusion, trickery and subornation of perjury." Resp. Br. 37. Respondent then attempts to connect *Lisenba*, *Mooney*, and *Berger* to the Court's eyewitness identification cases by claiming that the reasoning in the eyewitness identification cases focused on whether there was deliberate "manipulation" by the police to suggest identification of a particular suspect. Resp. Br. 36.

The flaw in Respondent's analysis is that the *Stovall* to *Brathwaite* line of cases never makes any connection to *Lisenba*, *Mooney*, or *Berger*.[1] The eyewitness cases do not cite *Lisenba*, *Mooney*, or *Berger* or discuss "manipulation," "fraud," "collusion," or "trickery." *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Foster v. California*, 394 U.S. 440, (1969); *Simmons v. United States*, 390 U.S. 377 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967); *Wade*, 388 U.S. 218. The eyewitness identification cases covered ten years, from 1967 to 1977. *Simmons* reiterated, in the photo identification context, the concerns *Wade* first identified regarding eyewitness identification evidence. *Simmons*, 390 U.S. at 383. *Foster* overturned a conviction based on unnecessarily suggestive circumstances which gave rise to an unreliable identification. *Foster*, 394 U.S. at 443. In both *Biggers* and *Brathwaite* the Court described its prior holdings and reasoning at length. *Biggers*, 409 U.S. at 196-99; *Brathwaite*, 432 U.S. at 104-07, 109-14. If those cases were based on a guiding principle derived from *Lisenba* and focused on a concern with "manipulated evidence," the Court would have said so.

Moreover, contrary to the arguments of Respondent and the United States, the Court did not limit its concern to deliberate police manipulation of identification evidence. Rather, the Court expressly included circumstances where the suggestive influences were not intended by the police. The Court said in *Wade* that, "Suggestion can be

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1. The only reference to *Lisbena*, *Mooney*, or *Berger*, in this Court's eyewitness identification opinions is Justice Black's dissent in *Wade* where he cites *Berger* and *Mooney*. *Wade*, 388 U.S. at 258.

created intentionally *or unintentionally* in many subtle ways." *Wade*, 388 U.S. at 229 (emphasis added). The Court emphasized that it was not motivated by "police procedures intentionally designed to prejudice the accused" but rather by "the dangers inherent in eyewitness identification and the suggestibility inherent in the context of pretrial identification." *Id.* at 235. When the *Brathwaite* Court referred back to this reasoning as the "driving force" behind the eyewitness identification opinions, the Court said "*Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Brathwaite*, 432 U.S. at 112. Nowhere in the Court's explanation of the driving force behind its decisions does the Court limit its concern to the manipulation of eyewitness identification evidence.

II. To The Extent That Respondent And The United States Accept That Unintentional Police Involvement In An Identification Implicates Due Process, They Agree That Perry Deserves Relief.

Perry explained in his brief that this Court's cases do not premise due process protections on police involvement at the time of the alleged suggestive circumstances because the state action which implicates the Due Process Clause is the State's use of the suggestive eyewitness identification evidence at trial. Br. 8-17, 27-29. Respondent and the United States disagree with Perry's analysis, but in doing so they fail to account for the role the police played in Perry's case and they appear to endorse, at least at some points, a theory which would entitle Perry to relief.

The United States describes police "involvement" as a prerequisite to the application of due process principles.

U.S. Br. 6, 8, 16, 18, 21, 23, 24. The United States also acknowledges at one point that "unintentional" police suggestion implicates due process. U.S. Br. 17. Similarly, Respondent seems to also acknowledge, while discussing *Moore v. Illinois*, 334 U.S. 220 (1977), the language in *Wade* that "unintentional . . . suggestion . . . from a police officer" is sufficient to implicate due process. Resp. Br. 38; *Wade*, 388 U.S. at 229.

While this Court's case law does not require state action or police "involvement" in the suggestive circumstances, Br. 8-17, 27-29, to the extent that Respondent and the United States acknowledge that unintended suggestion arising from police presence is sufficient to implicate due process, they must concede that the lower courts erred in refusing to consider Perry's due process challenge. Perry argued to the trial court and the New Hampshire Supreme Court that he was effectively identified in a showup. JA 78a, 86a, 425a-26a. He argued that the presence of the uniformed officer next to him, as well as the other police presence on the scene, provided "context clues" to Ms. Blandon.[2] The trial court described the situation as: "he's [Perry's] standing there next to another police officer and there's only two people in the lineup and one of them is dressed in blue," a description to which the prosecutor responded, "that's true." JA 47a. On that basis, Perry argued that the circumstances, especially the police presence, suggested to Ms. Blandon that Perry was the suspect and this led her to identify him even though she

2. Defense Counsel argued to the trial court at the suppression hearing: "[T]hese are powerful context clues . . . uniformed police officers, cruisers, things like that. When you remove the context clues . . . she failed to make an identification." JA 78a.

was never able to describe his clothes or face. JA 78a. Perry repeated these claims in his brief to this Court. Br. 34-35.

Obviously, the ultimate position of Respondent and the United States is that something more is required, and that there must be some intentional orchestration or improper conduct as held by the New Hampshire Supreme Court. Nevertheless, their references to unintentional involvement of the police in the suggestive situation are significant and reveal (1) a failure to recognize the impact of apparent police suspicion on Ms. Blandon's identification, and (2) the inconsistency between Respondent's arguments and this Court's case law.

III. The Risk Of Misidentification Is This Court's Primary Concern With Eyewitness Identification Evidence Arising From Suggestive Circumstances.

In arguing that police misconduct is a prerequisite to a due process claim, Respondent and the United States assert that Perry overemphasizes and mischaracterizes the Court's concern with the risk of misidentification which may arise from unreliable suggestive eyewitness identification evidence. Resp. Br. 39-40. Both briefs in opposition describe the Court's primary concern as police misconduct rather than the risk of misidentification. Resp. Br. 10, 41; U.S. Br. 6-7. Respondent recognizes this Court's conclusion in *Brathwaite* that "reliability is the linchpin in determining the admissibility of identification testimony," *Brathwaite*, 432 U.S. at 114, but claims that Perry has "wrenched that passage from *Brathwaite* out of context." Resp. Br. 40. The United States argues that "the question of reliability only arises after it is established that police

conduct has unfairly influenced an identification." U.S. Br. 19.

Both are incorrect. The Court's concerns with eyewitness identification evidence and the risk of misidentification have not been limited to circumstances of intentional misconduct by the police. The Court has not written that "improper police conduct" during an eyewitness identification violates the Due Process Clause. To the contrary, the Court said that "a showup without more does not violate due process." *Biggers*, 409 U.S. at 198.

Instead of focusing on whether the police acted "improperly" or "unfairly," as Respondent and the United States claim, the Court has consistently focused on the risk of misidentification. In *Biggers*, the Court reviewed the earlier identification cases and concluded that "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Id.* (quoting *Simmons*, 390 U.S. at 384). The risk of misidentification is the "primary evil" because, "It is the likelihood of misdentification which violates a defendant's right to due process." *Id.* Similarly, as described above, *Brathwaite* said, "*Wade* and its companion cases reflect a concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Brathwaite*, 432 U.S. at 112.

Therefore, contrary to the arguments of Respondent and the United States, this Court has explicitly identified its primary concern as the risk of misidentification presented by unreliable eyewitness identification evidence arising out of suggestive circumstances. The Court has

not limited its concern to circumstances of intentional police misconduct.

IV. *Stovall* And *Coleman* Do Not Support The Position Of Respondent And The United States.

In *Stovall*, the witness was hospitalized after having been attacked in her home by an intruder who also killed her husband. *Stovall*, 388 U.S. at 295. Fearing that the witness might not survive, the police brought the defendant to the hospital. *Id.* at 302. The defendant was the only black man in the room surrounded by a group of white law enforcement officers. *Id.* In spite of these circumstances, the Court found that the witness's identification of the defendant in the hospital room and at trial were both admissible over due process objections.

Respondent and the United States claim that the *Stovall* decision was made with complete disregard of the reliability of the identification evidence and that the Court's sole consideration was the necessity of the suggestive identification procedure. Resp. Br. 35; U.S. Br. 18. Respondent and the United States are incorrect, as both *Stovall* and this Court's later readings of *Stovall*, demonstrate.

The *Stovall* Court said that due process protects against an identification that is "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall*, 388 U.S. at 302. The Court did not limit itself to considering only the necessity created by the witness's hospitalization but instead said that the claimed violation of due process depended on the "totality of the circumstances." *Id.* Subsequently, in *Biggers* and

Brathwaite, the Court made clear that the deciding factor in *Stovall* was the risk of misidentification. The *Biggers* Court described the *Stovall* decision and explained that it was consistent with the "restated" test in *Simmons*. *Biggers*, 409 U.S. at 197 (quoting from *Simmons*, 390 U.S. at 377). The *Biggers* Court then followed its summary of prior case law, including *Stovall*, by stating that it is "the likelihood of misidentification which violates a defendant's right to due process." *Id.* at 198. Finally, the *Brathwaite* Court said that *Biggers* examined prior cases, including *Stovall*, and concluded that the "central question" is "whether under the totality of the circumstances the identification was reliable . . . ." *Brathwaite*, 432 U.S. at 106 (quoting from *Biggers*, 409 U.S. at 199). For these reasons, Respondent's claim that *Stovall* was not decided on the basis of reliability is incorrect. The *Stovall* Court's decision was that, considering the totality of the circumstances, especially the emergency, there was not a very substantial likelihood of misidentification.

In *Coleman*, the witness was shot by an assailant during a roadside attack. 399 U.S. at 3-4. Notwithstanding his condition, the witness said he "got a real good look" at the attacker. *Id.* He identified the defendant during a police station identification procedure. *Id.* at 5. He later identified the defendant at trial. A plurality of this Court rejected the defendant's due process claim that the suggestive procedures at the police station tainted the later in-court identification.

The United States claims that *Coleman* is a case where the Court disregarded suggestive circumstances because they were not created by the police. U.S. Br. 6-7, 20-21. The Court should reject this reading of

Coleman. Coleman's claim failed because the only source of suggestion which he identified was the behavior of the police. *Coleman*, 399 U.S. at 3. When the plurality opinion denied Coleman's claim, it simply concluded that the suggestion Coleman alleged either did not occur or was minimal. *Id.* at 6. Moreover, contrary to Respondent's argument that *Coleman* was decided solely by looking at whether the police created suggestive circumstances, the Court considered whether the lineup procedure was so suggestive as to create a very substantial likelihood of misidentification. *Id.* at 5. Finally, as with the reading of *Stovall*, the interpretation the United States gives to *Coleman* is undermined by this Court's own later reading of the case which identifies the risk of misidentification as the central concern. *Biggers*, 409 U.S. at 198; *Brathwaite*, 432 U.S. at 106.

V. The Non-Eyewitness Identification Cases Cited By Respondent And The United States Do Not Support Their Position.

Both Respondent and the United States rely on *Dowling v. United States*, 493 U.S. 342 (1990) and *Medina v. California*, 505 U.S. 437 (1992) for various general propositions of constitutional law. Resp. Br. 9, 14-15, 18, 41; U.S. Br. 22-23, 32. Neither of those cases discusses or cites this Court's eyewitness identification cases. As with the manipulated evidence argument based on *Lisenba*, there is no basis on which to believe that the Court intended *Dowling* or *Medina* to change the operative principles of the eyewitness identification cases.

Nevertheless, Respondent and the United States cite *Dowling* for the proposition that "this Court already has

declined to hold that the Due Process Clause imposes a threshold of evidentiary reliability in criminal trials." U.S. Br. 23. *See also* Resp. Br. 18. This broad proposition is accompanied by the implication that Perry urges the Court to adopt a due process reliability test for all evidence offered at criminal trials. Resp. Br. 13 (Petitioner asserts that the Due Process Clause requires "preliminary reliability determinations" for "testimony generally."); U.S. Br. 21 ("The due process clause does not impose a general threshold of evidentiary reliability in criminal cases."). In the same vein, Respondent and the United States invoke *Medina* to claim that granting relief to Perry would "constitutionalize the rules of evidence," U.S. Br. 31, and unduly interfere in the affairs more properly left to the judgment of each individual state. Resp. Br. 9, 14-15.

Perry does not advocate for an expansion or creation of due process rights as claimed by Respondent and the United States. He does, however, rely on this Court's holding that suggestive eyewitness identification evidence may be so unreliable as to create a risk of misidentification which violates due process. *Brathwaite*, 432 U.S. at 113 (The standard for the admissibility of suggestive eyewitness identification evidence is "fairness as required by the Due Process Clause of the Fourteenth Amendment.") Nor does Perry seek any change in the law that would "open the floodgates" to new claims. Perry simply asks to have his case heard according to the due process principles set forth in the cases already decided by this Court. Perry's arguments are based on the text and the stated rationale of those opinions. His interpretation is no more radical than the interpretation already adopted by federal courts of appeal in six circuits.

See United States v. De León-Quiñones, 588 F.3d 748, 754-56 (1st Cir. 2009) ("'federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police'")(quoting *United States v. Bouthot*, 878 F.2d 1506, 1515-16 (1st Cir. 1989)); *Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998), *cert. denied*, 525 U.S. 840 (1998) ("the linchpin of admissibility, therefore, is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable"); *Thompson v. Mississippi*, 914 F.2d 736, 739 (5th Cir. 1990), *cert. denied*, 498 U.S. 724 (even in the absence of state action "'a court must scrutinize any pretrial confrontation for possible due process violations'" (*quoting United States v. Thevis*, 665 F.2d 616, 643 (5th Cir.1982)); *Thigpen v. Cory*, 804 F.2d 893, 895-97 (6th Cir. 1986)("deterrence of police misconduct is not the basic purpose for excluding identification evidence"); *Green v. Loggins*, 614 F.2d 219, 222-23 (9th Cir. 1980)("a court is obligated to review every pretrial encounter, accidental or otherwise, in order to insure that the circumstances of the particular encounter have not been so suggestive as to undermine the reliability of the witness' subsequent identification"); *United States v. Elliot*, 915 F.2d 1455, 1457 (10th Cir. 1990)(applying due process principles to an in-court identification by a witness who had seen a photo of the defendant in a newspaper).

Respondent and the United States also discuss a number of cases which establish the trial rights afforded criminal defendants by the constitution. Both emphasize the right to counsel, the right to confrontation and cross-examination, and the right to a jury trial. Resp. Br. 20-28; U.S. Br. 22, 27-30. Perry agrees that, when suggestive eyewitness identification evidence is admitted

at trial, these are important rights which help a defendant challenge the evidence. *See Brathwaite*, 432 U.S. at 113. However, neither Respondent nor the United States reconciles its arguments with the express statements in *Wade*, *Simmons*, and *Brathwaite* that those trial rights are sometimes inadequate to address the unique dangers of suggestive eyewitness identification evidence. In *Brathwaite*, the Court described the dangers of suggestive eyewitness identification evidence and concluded, notwithstanding the importance of the right to a jury trial, that a jury should "not hear eyewitness testimony unless that evidence has aspects of reliability." *Brathwaite*, 432 U.S. at 112. In *Simmons* the Court described how suggestive photographs may affect a witness's memory so that what is retained is "the image of the photograph rather than of the person actually seen." *Simmons*, 390 U.S. at 383-84. Most significantly, *Wade* explains that a defendant's trial rights are not always adequate because "[t]he trial which might determine the accused's fate may well not be that in the courtroom" but instead the identification made prior to trial. *Wade*, 388 U.S. at 235-36. Once a witness has been exposed to suggestive circumstances and has declared "that's the man," the normally "precious safeguard" of cross-examination "cannot be viewed as an absolute assurance of accuracy and reliability." *Wade*, 388 U.S. at 229, 235. Finally, Respondent and the United States fail to note that their argument is the same argument made by Justice Black, in dissent, but not accepted by the Court. Br. 13. *See Foster*, 394 U.S. at 446-51.

The circumstances of Perry's identification involve the dangers which concerned this Court. From the perspective of Ms. Blandon, it made no difference whether

the police intended for her to look down and see Perry standing next to Officer Dunn or whether it was purely an accidental showup. As far as Ms. Blandon knew, she called the police because she saw a crime and the police found a suspect in the parking lot below her apartment. Contrary to the assertions of Respondent and the United States, the record does not establish whether she continually watched the suspect until the police arrived. JA 62a. (In this regard it should be noted that only the suppression hearing testimony may be considered under New Hampshire law. *State v. Pseudae*, 154 N.H. 196 (2006)). Even though Ms. Blandon was never able to describe the suspect's face or clothes, she failed to pick him out of a photo lineup, and she did not identify him at trial, her accusation of "that's the man" was admitted at Perry's trial. Thus, this case presents the very dangers identified by this Court in the cases from *Wade* to *Brathwaite*. Perry's due process claim should have been heard and the trial court should have determined whether there was an unacceptable risk of misidentification.

VI. The Only Evidence Excluded From Trial Under This Court's Eyewitness Cases Is Evidence Which Has No Legitimate Value For The Prosecution.

Finally, the United States argues that a decision in Perry's favor will "frustrate the administration of justice" through the "exclusion of relevant, probative evidence" from Perry's trial and the trials of other criminal defendants. U.S. Br. 7, 30. This argument fails to recognize the standard established by this Court. The only evidence which is excluded under the due process principles described in this Court's case law is impermissibly suggestive eyewitness identification evidence which the

trial judge finds is "very substantially likely" to lead to misidentification. *Brathwaite*, 432 U.S. at 116; *Simmons*, 390 U.S. at 384. In other words, the only evidence which the prosecution will lose is evidence which a trial judge believes is very substantially likely to lead to conviction of the wrong person. Thus, prosecutors do not lose evidence of any significant value. To the contrary, evidence that is that unreliable would not help the trier of fact reach a just and true result. More importantly, far from frustrating the administration of justice, this standard does nothing more than guard against miscarriages of justice and the conviction of innocent citizens.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original brief, Petitioners requests that the Court vacate the decision of the New Hampshire Supreme Court and remand his case for proceedings consistent with a holding that the Due Process Clause does not require a criminal defendant to show improper state action by the police in order to challenge the admissibility of an identification arising from suggestive circumstances.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-8974

In the Supreme Court of the United States

BARION PERRY, PETITIONER

v.

STATE OF NEW HAMPSHIRE

ON WRIT OF CERTIORARI
TO THE NEW HAMPSHIRE SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause requires a judicial inquiry into the reliability of an eyewitness identification, where the identification was not procured under unnecessarily suggestive circumstances orchestrated by law enforcement.

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Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* (2009) 27
John Schwartz, *Changes to Police Lineup Procedures Cut Eyewitness Mistakes, Study Says*, N.Y. Times, Sept. 19, 2011, at A13 19
Lawrence Taylor, *Eyewitness Identification* (1982) 28
U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (Oct. 1999) 32

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Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* (1965) 10

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In the Supreme Court of the United States

No. 10-8974

BARION PERRY, PETITIONER

v.

STATE OF NEW HAMPSHIRE

ON WRIT OF CERTIORARI
TO THE NEW HAMPSHIRE SUPREME COURT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the Due Process Clause of the Fourteenth Amendment requires a judicial inquiry into the reliability of an eyewitness identification, where the identification was not procured under unnecessarily suggestive circumstances orchestrated by law enforcement. Because the Due Process Clause of the Fifth Amendment applies to defendants tried in federal courts, the United States has a significant interest in the disposition of this case.

STATEMENT

1. In the early morning hours of August 15, 2008, police in Nashua, New Hampshire, received a report that a man was breaking into cars in an apartment

building parking lot. Pet. App. A7. The report came from Joffre Ullon, who lived in a fourth-floor apartment with his wife, Nubia Blandon. J.A. 226a, 240a. Blandon had been looking out the window and noticed a tall African-American man peering into cars in the parking lot, then opening the trunk of a neighbor's car and removing items. Pet. App. A8; J.A. 48a, 55a, 61a, 213a-214a. Blandon told her husband what she saw, and he went to investigate as Blandon watched from the window. J.A. 213a, 239a. Ullon saw the man looking into cars, and the man apparently saw Ullon, because he turned away and tried to hide. J.A. 238a-239a. Ullon returned to the apartment and called the police. J.A. 240a-241a.

Officer Nicole Clay was dispatched to investigate. Pet. App. A7. When Officer Clay arrived on the scene, she heard a loud metallic clang. *Ibid.* Then she saw petitioner walking out from between two cars, carrying two amplifiers, with a metal baseball bat on the ground behind him. *Ibid.*; J.A. 162a-163a, 175a. Officer Clay asked where the amplifiers came from; petitioner said he had found them on the ground in the parking lot and was just moving them. Pet. App. A8.

In the meantime, Blandon woke up her neighbor, Alex Clavijo, to tell him that someone had broken into his car. J.A. 122a, 216a. Clavijo went downstairs and saw that one of the rear windows of his car had been shattered and that the amplifiers and speakers from the car's stereo system were missing, along with a metal bat and a wrench. J.A. 122a-124a.

Clavijo approached Officer Clay and told her that Blandon had witnessed someone breaking into his car. Pet. App. A8. Officer Clay left petitioner in the parking lot with another officer and went with Clavijo to see

Blandon. *Ibid.*; J.A. 171a. Officer Clay asked petitioner to stay in the parking lot with the officer because "it was an ongoing investigation and we needed to make sure we had all parties that had knowledge of the situation to remain on scene until we figured out what was going on." J.A. 43a.

Blandon spoke with Officer Clay from the doorway of her apartment. Pet. App. A8. Blandon told Officer Clay that she had watched from her apartment window as a tall African-American man carrying a baseball bat circled Clavijo's car, opened the trunk, and removed a large box (which contained the speakers from the car's stereo system). *Ibid.*; J.A. 55a-56a, 61a, 213a-214a. Officer Clay asked for a more specific description of the man, and Blandon pointed toward the window and said that the man was standing with a policeman outside. Pet. App. A8-A9; J.A. 48a, 173a-174a. Ullon said the same thing. J.A. 55a. At the time of this identification, petitioner was standing next to the officer but was not handcuffed or otherwise restrained. Pet. App. A11; J.A. 43a.

The police then arrested petitioner. Pet. App. A9. Clavijo identified the amplifiers petitioner had been carrying as the ones from his car. J.A. 180a. Clavijo's speakers were in the parking lot, a short distance from where Officer Clay first encountered petitioner, and Clavijo's wrench was in petitioner's pocket. J.A. 177a-178a, 180a, 189a-191a.

About a month later, the police showed Blandon and Ullon a photo array that included petitioner's photograph and asked them to identify the man who had broken into Clavijo's car. Pet. App. A9. Blandon was unable to make an identification, but Ullon immediately

picked out petitioner. *Ibid.*; see J.A. 234a-235a, 242a-243a, 290a.

2. Petitioner was charged in state court on one count of theft, in violation of N.H. Rev. Stat. Ann. § 637:3 (2007), and one count of criminal mischief, in violation of N.H. Rev. Stat. Ann. § 634:2 (2007). Pet. App. A7; J.A. 20a. He moved to suppress Blandon's initial identification of him on the ground that admitting it at his trial would violate his due process rights. Pet. App. A3-A6.

The trial court denied the motion. Pet. App. A7-A12. The court explained that whether admission of the identification evidence would violate due process depends on (1) whether the identification procedure was "unnecessarily suggestive" and (2) whether that procedure was "so suggestive as to render the identification unreliable and inadmissible." *Id.* at A9-A10 (citing *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977); internal quotation marks omitted). The court determined that the identification procedure was not unnecessarily suggestive because "Blandon pointed out [petitioner] from her apartment window without any inducement from the police" and her identification "was spontaneously given." *Id.* at A10. The court explained that "Officer Clay did not ask Ms. Blandon whether the man standing in the parking lot was the man [she] had seen breaking into Mr. Clavijo's car" or "direct Ms. Blandon's attention towards the window"; Officer Clay "could not even see [petitioner] and [the other officer] from where she was standing." *Ibid.*

The court acknowledged that certain circumstances surrounding the identification—that "the parking lot was dark," that petitioner "was standing with a uniformed officer in the parking lot where the crime was

committed," and that petitioner "was the only black male in the vicinity"—may "cast doubt" on it. Pet. App. A10. But, the court explained, the proper course was for petitioner to cross-examine Blandon about those matters at trial, not to exclude the evidence altogether under the Due Process Clause. *Id.* at A10-A11.

The jury found petitioner guilty of theft and acquitted him of criminal mischief. J.A. 408a-409a. The trial court sentenced him to three to ten years of imprisonment. Pet. C.A. Br. App. 24.[1]

3. The New Hampshire Supreme Court affirmed. Pet. App. A1-A2. The court explained that the "admissibility of identification evidence over a due process objection" is determined using the two-step analysis set out in *Neil* v. *Biggers*, *supra*, which asks first whether the identification procedure was unnecessarily suggestive and second whether that procedure resulted in an identification that is so unreliable that its introduction at trial would violate due process. Pet. App. A1. The New Hampshire Supreme Court agreed with the trial court that petitioner's claim "failed * * * on the first step of the *Biggers* analysis" because Blandon's "identification of [petitioner] was not derived from any suggestive technique employed by the police." *Id.* at A1-A2.

SUMMARY OF ARGUMENT

The Due Process Clause does not require a judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under un-

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[1] Petitioner's lengthy sentence is attributable to his extensive criminal history, which includes two prior felony convictions for theft and at least one prior felony conviction for burglary. J.A. 310a, 346a-347a, 438a.

necessarily suggestive circumstances orchestrated by law enforcement.

A. This Court's decisions establish a limited due process protection against the introduction at trial of eyewitness identifications obtained by the police under suggestive circumstances. If the police obtain an identification under suggestive circumstances—through a lineup, showup, photo array, or similar procedure in which the police suggest that a certain suspect is the perpetrator—and those circumstances were unnecessary, then a court should ask whether the identification is unreliable. If the police suggestion produces a very substantial likelihood that the identification is wrong, then the evidence may not be admitted at the defendant's trial. Short of that point, the circumstances of the identification go to weight, not admissibility.

B. Police involvement is a necessary prerequisite for a due process analysis into the reliability of an identification. Every one of the Court's decisions in this area involved identifications obtained by the police, and every example the Court has provided of unnecessarily suggestive circumstances likewise involved law enforcement. The Court adopted its limited due process rule because it was concerned that police suggestion would lead a witness to choose the wrong person, not because it believed that eyewitness identifications are inherently unreliable. Further, the Court adopted its due process rule after balancing the need for police deterrence against the need to allow the jury to hear all relevant, probative evidence. Absent suggestive police practices, the rationale for exclusion is diminished substantially. The one time the Court considered a due process challenge to an identification made under suggestive circum-

stances not orchestrated by the police, the Court rejected it. See *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

C. The Due Process Clause does not impose a general threshold of evidentiary reliability in criminal cases. The guarantee of a fair trial is primarily furthered through the specific rights provided in the Sixth Amendment, including the rights to counsel, compulsory process, and confrontation. This Court has declined to expand the Due Process Clause to give criminal defendants a right to exclude unreliable evidence at trial, recognizing that it is the role of the jury to weigh the evidence. Moreover, the Court has declined to fashion due process rules that exclude relevant evidence from the jury in the absence of police involvement, because such rules would impose a substantial societal cost with no corresponding deterrence benefit. See *Colorado* v. *Connelly*, 479 U.S. 157 (1986).

D. Cases involving eyewitness identification testimony where no police suggestion occurs do not require a new due process rule. Concerns about reliability may be fully addressed through the right to counsel at post-indictment lineups, through vigorous cross-examination at trial, through state and federal rules of evidence, and through jury instructions concerning eyewitness identification evidence. Petitioner's proposed approach would exact a substantial societal cost by excluding relevant and probative evidence in criminal trials, would take away the jury's crucial role in finding facts in our adversary system, and would invite criminal defendants to bring freestanding due process challenges to all sorts of potentially unreliable evidence. The New Hampshire Supreme Court correctly rejected that approach, and its judgment should be affirmed.

ARGUMENT

THE ADMISSION AT TRIAL OF AN UNRELIABLE EYEWITNESS IDENTIFICATION DOES NOT VIOLATE THE DUE PROCESS CLAUSE IN THE ABSENCE OF POLICE INVOLVEMENT IN GENERATING THE IDENTIFICATION

In this case, an eyewitness watched from her window as a man walked through the parking lot below, peered into several cars, forced entry into one of the cars, and removed its stereo system. She continued watching as a police officer arrived on the scene and questioned the man about his activities. When the police officer later asked her for a description of the person who committed the crime, she informed the officer that the man was standing outside in the parking lot, talking with another officer. The question in this case is whether the Due Process Clause requires special judicial scrutiny of this identification because petitioner happened to be standing next to a police officer when the eyewitness identified him. The answer is no.

A. This Court Has Recognized A Limited Due Process Protection Against The Introduction At Trial Of Certain Unreliable Identification Evidence Resulting From Police Suggestion

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. In a series of cases, this Court determined that when police obtain an identification under unnecessarily suggestive circumstances, and police influence produces a very substantial likelihood of a mistaken identification, the Due Process Clause

precludes the introduction of the identification at trial.[2] A careful review of those cases makes clear that the Court intended the due process protection to be a limited one.

1. The concern that motivated the Court to adopt the due process principle at issue was police influence during situations orchestrated to obtain identifications, such as lineups, showups, and photo arrays. This concern was first enunciated not in the context of the Due Process Clause, but in the context of the Sixth Amendment right to counsel. In *United States* v. *Wade*, 388 U.S. 218 (1967), and a companion case, *Gilbert* v. *California*, 388 U.S. 263 (1967), the Court considered whether a post-indictment lineup is a "critical stage" of a prosecution where a defendant is entitled to the assistance of counsel. *Wade*, 388 U.S. at 237. In concluding that such a lineup is a critical stage, the Court relied in significant part on concerns that the police may engineer lineups to suggest to the witness that a certain suspect is guilty.

The Court explained that its focus was not the reliability of eyewitness identifications generally, but the substantially increased risk of a mistaken identification that arises when "the prosecution presents the suspect to witnesses for pretrial identification" under suggestive circumstances. *Wade*, 388 U.S. at 228; see *id.* at 228-229 ("[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages

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[2] The Court has not had occasion to reconsider these decisions in light of its recent recognition that the reliability of evidence at a criminal trial is addressed through the protections of the Sixth Amendment and the local rules of evidence, rather than the Due Process Clause. See *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004); *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986); see also pp. 27-30, *infra*.

of justice than any other single factor." (quoting Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (1965))). The Court determined that it would be unfair if the State could "compel[]" a confrontation "between the accused and the victim or witnesses," and then manipulate the lineup to suggest that a certain person is the perpetrator of the crime. *Id.* at 228, 232-233. The "first line of defense" to mitigate these concerns, the Court decided, was the assistance of counsel; counsel could "be alert for" and object to "conditions prejudicial to the suspect" at police-arranged identifications. *Id.* at 228-230, 235.

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), decided the same day as *Wade* and *Gilbert*, the Court explained that the concern about police influence that motivated the decision to afford defendants counsel at post-indictment lineups could also support a due process claim. The primary argument made by the defendant was that the Court's new Sixth Amendment rule should apply retroactively. *Id.* at 294. The Court rejected that argument, *id.* at 300-301, and then considered the back-up argument that the showup at issue—where the police brought the defendant to the witness's hospital room in handcuffs—"was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process," *id.* at 302. The Court rejected that argument, explaining that even if the identification procedures were suggestive, they were necessary: the witness had just undergone "major surgery to save her life," it was uncertain she would survive, and the police used "the only feasible procedure" to identify or exonerate the suspect. *Id.* at 295, 302.

2. In the cases that followed, the Court reiterated that the due process concern raised by identification

evidence was the risk of misidentification created by police influence. The Court explained that even with unnecessary police suggestion, the resulting identification may still be admissible.

In *Simmons* v. *United States*, 390 U.S. 377 (1968), for example, the defendant argued that his due process rights were violated when witnesses identified him in court as a bank robber following out-of-court identifications that were allegedly tainted by police suggestion. *Id.* at 382-383. The Court explained that, although police influence on a witness to choose a certain suspect posed a "danger," *id.* at 383, the danger could "be substantially lessened by * * * cross-examination at trial." *Id.* at 384. Accordingly, the Court held that the Due Process Clause does not require exclusion of an identification unless the identification has been irreparably tainted by police influence: the police procedure must have been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Ibid.* That was not the case in *Simmons*, because the photo array used by the police was not unnecessarily suggestive and there was "little chance" that police influence led to a misidentification. *Id.* at 385.[3]

In *Foster* v. *California*, 394 U.S. 440 (1969), by contrast, the Court determined that the identification procedures used by the police were so suggestive that it was "all but inevitable that [the witness] would identify petitioner" as the perpetrator of the robbery. *Id.* at 443. The Court recognized that "[t]he reliability of properly

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[3] The Court also rejected the due process challenge to an identification at a lineup in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), on the ground that the identification was "not at all induced by the conduct of the lineup." *Id.* at 6; see pp. 20-21, *infra*.

admitted eyewitness identification, like the credibility of other parts of the prosecution's case[,] is a matter for the jury." *Id.* at 442 n.2. But when the police placed the defendant in a series of suggestive lineups, arranged a "one-to-one confrontation" with the defendant, and even told the witness, "This is the man," the Court determined that police suggestion "so undermined the reliability of the eyewitness identification as to violate due process." *Id.* at 441-443. *Foster* is the only case in which the Court has found a due process violation based on the introduction of tainted identification evidence at trial.

3. In its final two decisions addressing due process challenges to eyewitness identification evidence, the Court clarified that the Due Process Clause limits the introduction of identification evidence at trial only when two things are true: the identification is the product of unnecessary suggestion by the police and the identification has been so tainted by police suggestion that there is a very substantial likelihood that it is wrong.

In *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), the Court considered whether exclusion is mandatory when an identification is the product of unnecessary police suggestion, or whether countervailing concerns might permit the introduction of that evidence at trial notwithstanding the police suggestion. In *Biggers*, which addressed only identifications made before *Stovall*, the Court held that an identification obtained under unnecessarily suggestive circumstances is not automatically inadmissible, because the purpose of a rule of exclusion would be to "deter the police" from using such procedures, and before *Stovall*, the police lacked notice that due process

limited the use of identification evidence. 409 U.S. at 199.

In *Brathwaite*, the Court expanded upon its holding in *Biggers*, explaining that even for post-*Stovall* identifications, the Due Process Clause does not preclude the use of an identification at trial absent a very substantial likelihood of misidentification that cannot be addressed by the adversary process. 432 U.S. at 117. The Court considered two different approaches to identifications tainted by unnecessary police suggestion: a per se rule of exclusion and a "more lenient" approach of allowing admission of the evidence so long as it was sufficiently reliable. *Id.* at 110. A significant factor favoring exclusion, the Court observed, was the "need for deterrence": excluding all identifications made under suggestive circumstances would have a "direct and immediate impact on law enforcement agents" because the police would know if they used such procedures, the evidence could be unavailable at trial. *Id.* at 111. Also favoring exclusion was the need for accuracy, because police suggestion may distort the witness's recollection. *Id.* at 112.

But the Court also recognized strong countervailing concerns. Eyewitness identification evidence is probative evidence of guilt, and it may be reliable despite police influence. *Brathwaite*, 432 U.S. at 112. A per se rule of exclusion "goes too far," the Court decided, because it "keeps evidence from the jury that is reliable and relevant," and therefore "may result * * * in the guilty going free." *Ibid.* The Court explained that the defendant's "evidentiary interest" in keeping the identification from the jury is "limited * * * in our adversary system," which presumes that the jury can resolve any "doubts as to the accuracy of the identification" af-

ter cross-examination and argument. *Id.* at 113-114 & n.14 (citation omitted).

Accordingly, rather than require exclusion of every identification made under unnecessarily suggestive circumstances, the Court held that such an identification only is inadmissible at trial when there is a "very substantial likelihood of irreparable misidentification" resulting from police suggestion. *Brathwaite*, 432 U.S. at 113, 116 (citation omitted). Whether such a likelihood exists depends upon "the opportunity for the witness to view the criminal at the time of the crime," "the witness'[s] degree of attention," "the accuracy of his prior description of the criminal," "the level of certainty demonstrated at the confrontation," and "the time between the crime and the confrontation." *Id.* at 114.

4. In every one of the decisions addressing due process limitations on eyewitness identification testimony, the Court was motivated by concerns that police would fashion procedures that would suggest to a witness that a particular suspect was the perpetrator, which could lead the witness to choose the wrong person. At the same time, the Court was reluctant to take reliable, probative evidence of guilt from the jury. And the Court recognized that providing counsel at post-indictment lineups would provide an additional check on unnecessary police suggestion. Accordingly, the due process protection recognized by the Court is a narrow one: Even where law enforcement officials unnecessarily create a risk of misidentification by using a suggestive lineup, showup, or photo array, the resulting identification is admissible at the suspect's trial unless the police suggestion has so tainted the identification that there is a very substantial likelihood of misidentification.

B. Police Suggestion Is A Necessary Prerequisite To A Due Process Inquiry Into The Reliability Of Eyewitness Identification Evidence

Petitioner contends (Br. 11-17) that this Court's decisions establish that the Due Process Clause requires a judicial analysis of the reliability of any identification obtained under suggestive circumstances, even where law enforcement played no role in orchestrating those circumstances. He is mistaken.

1. Every one of this Court's cases addressing the due process protection against use at trial of unreliable identifications made under suggestive circumstances involved police conduct. The cases considered lineups, showups, and photographic identifications—formal confrontations between a witness and a suspect designed by police to obtain an identification. See *Brathwaite*, 432 U.S. at 101 (photographic identification); *Biggers*, 409 U.S. at 194-195 (lineups and showup); *Coleman* v. *Alabama*, 399 U.S. 1, 3 (1970) (lineup); *Foster*, 394 U.S. at 441 (two lineups and a showup); *Simmons*, 390 U.S. at 382 (photos); *Stovall*, 388 U.S. at 295 (showup).

Contrary to petitioner's suggestion (Br. 29), this was not happenstance. Police suggestion triggered the due process concerns in the first place. The Court did not say that the Due Process Clause protects against use of unreliable eyewitness testimony in general; it concentrated on the particular risk of mistaken identification when police "focus[] the witness'[s] attention on [a suspect] as the man believed by the police to be the guilty person." *Stovall*, 388 U.S. at 296. The Court explained that the police are in a unique position of influence because they can arrange a "confrontation * * * between the accused and the victim or witnesses to a crime" and

then "present[] the suspect to witnesses" in a manner that suggests he is guilty. *Wade*, 388 U.S. at 228.

It is the "coercive pressure" the police place on a witness to identify a certain person that implicates the due process guarantee of a fundamentally fair trial. *Brathwaite*, 432 U.S. at 116; see *Foster*, 494 U.S. at 443. The Court has never suggested that it would be fundamentally unfair to admit an identification at trial simply because it is unreliable. Instead, the Court focused on the "potential for improper influence" when the police arrange confrontations for purposes of obtaining an identification. *Wade*, 388 U.S. at 233.

2. A due process inquiry into reliability of an identification, the Court has explained, is required only when the identification is made under "unnecessarily suggestive" circumstances. See, *e.g.*, *Brathwaite*, 432 U.S. at 112-113; *Biggers*, 409 U.S. at 198-199; *Foster*, 394 U.S. at 442; *Stovall*, 388 U.S. at 302. Both requirements—that the circumstances be suggestive and that they be unnecessary—are premised on the understanding that police influence is what raises due process concerns.

a. Suggestive circumstances are instances where the police arrange a confrontation of a witness and suspect in a manner that suggests, implicitly or explicitly, that a certain suspect is the guilty party. See *Stovall*, 388 U.S. at 296; see also *Simmons*, 390 U.S. at 383 (listing examples of suggestive identification procedures, all of which involve law enforcement); *Wade*, 388 U.S. at 232-233 (same). When the police set the stage for an identification, they are in a unique position to influence the witness. *Brathwaite*, 432 U.S. at 116 (asking whether there was "pressure on the witness to acquiesce in the suggestion" made by the police).

Petitioner points to two different statements to support his view that the Court "was concerned with all suggestive influences, not just those orchestrated by the police." Br. 28. First, he cites (*ibid.*) the Court's statement in *Wade* that "[s]uggestion can be created intentionally or unintentionally." 388 U.S. at 229. But that statement was made only in the context of *police* suggestion. *Ibid.*; see *Moore* v. *Illinois*, 434 U.S. 220, 224-225 (1977) ("Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, *coming from a police officer or prosecutor*, can lead a witness to make a mistaken identification." (right to counsel context; emphasis added)). Second, petitioner cites (Br. 12, 28) the Court's remark in *Brathwaite* that a "witness'[s] recollection * * * can be distorted easily by the circumstances or by later actions of the police." 432 U.S. at 112. The "circumstances" to which the Court refers are not suggestive identification circumstances; rather, they are the circumstances of the crime itself, *i.e.*, "an encounter with a total stranger under circumstances of emergency or emotional stress." *Ibid.* Accordingly, this Court's cases do not support petitioner's expansive understanding of "suggestive" circumstances.

b. Further, the due process protection at issue is triggered only when an identification is made under *unnecessarily* suggestive circumstances. The necessity inquiry only makes sense in the context of police conduct. In *Stovall*, for example, the Court found no due process violation when police officers took a murder suspect in handcuffs to the witness's hospital room, because even though the practice of showing suspects singly to witnesses is disfavored, the possibility the witness might

not survive made an immediate confrontation "imperative." 388 U.S. at 302. Because the Court concluded that the procedure, though suggestive, was necessary, it did not consider the separate question whether the resulting identification was sufficiently reliable. *Ibid.* See *Simmons*, 390 U.S. at 384-385 (identification procedures were necessary because "a serious felony had been committed" and it was "essential" for FBI agents to swiftly determine whether they were on the right track). The Court's requirement that a suggestive identification procedure be "unnecessary" before it implicates due process concerns reflects the well-established principle that "the exigencies of the situation" may "make the needs of law enforcement so compelling" that they justify investigatory techniques that are normally not permitted. *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011) (citation and internal quotation marks omitted).

Petitioner acknowledges (Pet. 13) that a due process inquiry is required only when an identification is made under unnecessarily suggestive circumstances, but he provides no explanation of how to determine whether suggestive circumstances are necessary outside the context of police investigations. And it would be difficult to conduct such an inquiry outside the context of law enforcement, particularly where, as here, no one deliberately arranged the circumstances to obtain an identification.

3. The Court's explanation of when identifications obtained under unnecessarily suggestive circumstances are admissible at trial also presumes police involvement. The Court stated that even when an identification results from unnecessarily suggestive circumstances, the identification is not kept from the jury absent a "very substantial likelihood" that the identification is wrong.

Biggers, 409 U.S. at 198 (citation omitted). To reach that conclusion, the Court weighed the costs of exclusion against its benefits. A significant factor favoring exclusion, the Court observed, was that it would "deter[] * * * improper identification practice" by the police. *Brathwaite*, 432 U.S. at 111. The Court explained that excluding unreliable identifications tainted by police suggestion would "influence" the police to "guard against unnecessarily suggestive procedures" in order to avoid making the evidence unavailable at trial. *Id.* at 112. That deterrence rationale makes little sense in the context of private actors, who are unlikely to be repeat players and do not operate under standard procedures like the police. Moreover, private actors, unlike government institutions, are unlikely to take action to improve identification procedures when concerns arise about the reliability of eyewitness identifications. See, *e.g.*, John Schwartz, *Changes to Police Lineup Procedures Cut Eyewitness Mistakes, Study Says*, N.Y. Times, Sept. 19, 2011, at A13; see also p. 32, *infra*.

Petitioner contends (Br. 14-15, 25) that police involvement is not required to raise due process concerns because this Court said that "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. But that statement appears in the second part of the Court's analysis, which addresses whether an identification made under unnecessarily suggestive circumstances may nonetheless be admitted at trial because it is sufficiently reliable. The question of reliability only arises after it is established that police conduct has unfairly influenced an identification. See pp. 12-14, *supra*; see *McDaniel* v. *Brown*, 130 S. Ct. 665, 674 (2010) (per curiam) ("[W]hen *the police* have used a suggestive eyewitness identification proce-

dure, 'reliability is the linchpin in determining' whether an eyewitness identification may be admissible." (emphasis added; citation omitted)).

Contrary to petitioner's suggestion (Br. 28), the Court did not choose between deterrence and reliability as the goal in its eyewitness identification cases. Rather, the Court determined that it could both deter police from using certain procedures and foster the search for truth in the trial process by allowing the jury to consider identification evidence obtained under unnecessarily suggestive circumstances so long as the evidence is sufficiently reliable. *Brathwaite*, 432 U.S. at 111-113. The ultimate question under the Due Process Clause, the Court explained, is whether the introduction of the identification would make the defendant's trial fundamentally unfair, and the Court determined that such unfairness would arise only where law enforcement attempts to influence a witness to identify a certain suspect and where there is a very substantial likelihood that the resulting identification is wrong. *Id.* at 116-117.

4. Significantly, the one time the Court considered a due process claim where some of the allegedly suggestive circumstances were not orchestrated by the police, the Court rejected it.

In *Coleman* v. *Alabama*, *supra*, the Court considered two defendants' claim that a station-house lineup was "so unduly prejudicial and conducive to irreparable misidentification as fatally to taint" the witness's later in-court identification. 399 U.S. at 3 (plurality opinion). Every Member of the Court rejected that claim.[4] A plurality of the Court found no due process violation be-

[4] See 399 U.S. at 6 (plurality opinion), 13-14 (Black, J., concurring), 21 (Harlan, J., concurring), 22 n.2 (Burger, J., dissenting), 28 n.2 (Stewart, J., dissenting).

cause the witness's identifications were "not at all induced by the conduct of the lineup." *Id.* at 6 (plurality opinion).

The plurality specifically rejected the view that circumstances not controlled by the police could raise due process concerns. The defendants had argued that the lineup was defective because the witness believed at the time of the lineup that the police "had caught his assailants." *Coleman*, 399 U.S. at 6 (plurality opinion). The plurality rejected the argument because "the record is utterly devoid of evidence that anything the police said or did prompted" the witness's identification. *Ibid.*

The plurality also rejected the argument that the lineup was impermissibly suggestive because one of the defendants happened to be wearing a hat during the lineup and "[o]ne of the attackers had worn a hat." *Coleman*, 399 U.S. at 6 (plurality opinion). The plurality explained that "nothing in the record shows that [the defendant] was required to" wear a hat. *Ibid.* In the absence of any police conduct creating suggestive identification circumstances, the Court easily rejected the defendants' due process challenge.

C. The Due Process Clause Does Not Impose A General Threshold Of Evidentiary Reliability In Criminal Cases

Petitioner proposes a freestanding due process protection against the introduction of unreliable identification evidence at a criminal trial, even in the absence of any concerns about government actors unfairly influencing the identification. Such an approach is inconsistent with the Court's explanation of the role of the Due Process Clause in criminal trials and its decisions requiring government involvement before excluding evidence from criminal trials on due process grounds.

1. In criminal cases, "denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). The Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). "Judges are not free, in defining due process, to impose on law enforcement officials [their] personal and private notions of fairness and to disregard the limits that bind judges in their judicial function." *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (citation and internal quotation marks omitted). Rather, the task under the Due Process Clause is to "determine only whether the action complained of * * * violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Ibid.* (citations and internal quotation marks omitted).

While "[t]he Constitution guarantees a fair trial through the Due Process Clauses," it "defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1994). The Sixth Amendment provides defendants with the rights to effective assistance of counsel, *id.* at 687; to compulsory process, *Taylor* v. *Illinois*, 484 U.S. 400, 408-409 (1988); and to confrontation and an opportunity for effective cross-examination of witnesses, *Delaware* v. *Fensterer*, 474 U.S. 15, 19-20 (1985) (per curiam). By providing defendants with these mechanisms to test the prosecution's witnesses, the Constitution guarantees "not that evidence be reliable, but that reliability be assessed in a particular manner." *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004).

2. The Due Process Clause does not guarantee that all evidence admitted at a defendant's trial be unassailably reliable. As the Court has explained, "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba*, 314 U.S. at 236. The admission of inaccurate testimony does not render a trial fundamentally unfair because the trial process includes multiple means to address that testimony. The Court only has required exclusion of evidence in limited circumstances where government involvement in procuring or presenting the evidence so skewed the defendant's trial as to make it fundamentally unfair.

Indeed, this Court already has declined to hold that the Due Process Clause imposes a threshold of evidentiary reliability in criminal trials. In *Dowling* v. *United States*, *supra*, the Court found no due process bar to the introduction at trial of evidence of a defendant's prior crime, even though the defendant had been acquitted. 493 U.S. at 352. The Court recognized that such evidence "has the potential to prejudice the jury," but it determined that that potential was appropriately addressed "through nonconstitutional sources like the Federal Rules of Evidence," rather than through the strong medicine of the Due Process Clause. *Ibid.* The defendant argued that the evidence of his prior crime was "inherently unreliable"; the court responded that the defendant "had the opportunity to refute" the evidence of the prior crime and that it was the role of the jury to "assess the truthfulness and the significance" of that evidence. *Id.* at 353. Under those circumstances, the Court would not "condemn[]" the introduction of the evidence as fundamentally unfair. *Ibid.*

Kansas v. *Ventris*, 129 S. Ct. 1841 (2009), makes the same point, albeit in the context of the right to counsel. In that case, the defendant contended that "jailhouse snitches are so inherently unreliable" that the Court should "craft a broader exclusionary rule" for violations of the Sixth Amendment right to counsel using jailhouse snitches as opposed to other government agents. *Id.* at 1847 n.*. The Court declined to do so, explaining that "[o]ur legal system * * * is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses" and that the Court has long avoided using the Constitution to override state rules of criminal procedure. *Ibid.*

3. Rather than expand the due process guarantee to require the exclusion of all unreliable evidence, this Court has focused on the critical element of governmental involvement. Even when testimony is false—not merely unreliable—the Court has hesitated before deploying the Due Process Clause. The Court has held that it violates the Due Process Clause for a prosecutor to present at trial material testimony he or she knows to be false. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). The Court explained that exclusion was required because it is unfair for the government to "knowingly use" the evidence at the defendant's trial "to obtain a tainted conviction." *Napue*, 360 U.S. at 269. Except in those limited circumstances, "it is not improper to put on a witness whose testimony may be impeached" because "[t]ruth determination is still the traditional jury function." *United States* v. *Perkins*, 94 F.3d 429, 433 (8th Cir. 1996), cert. denied, 519 U.S. 1136 (1997).

This Court's decision in *Colorado* v. *Connelly*, 479 U.S. 157 (1986), makes clear that government conduct,

not evidentiary unreliability, is required before the Court will invoke the Due Process Clause to exclude relevant evidence at a criminal trial. In that case, the Court determined that the Due Process Clause did not bar use at trial of a confession prompted not by police questioning but by the "voice of God" in the defendant's head. *Id.* at 161-162, 165-166. The Court determined that the confession was not involuntary, and its admission did not violate due process, because the "crucial element of police overreaching" was missing. *Id.* at 163. "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause"; instead, the Court explained, a due process violation turns on police influence. *Id.* at 165-166. Excluding evidence that was not the result of police action, the Court observed, would "impose[] a substantial cost on the societal interest in law enforcement" by precluding the jury from considering "what concededly is relevant evidence" and would "serve absolutely no purpose in enforcing constitutional guarantees" because the police "had done nothing wrong." *Id.* at 162, 166 (citation omitted).

The Court explained that in the absence of police influence, the presumption was that all relevant evidence—even unreliable evidence—should be heard by the jury. Exclusion of relevant evidence "deflect[s] a criminal trial" from its "basic purpose," which is "to decide the factual question of the defendant's guilt or innocence." *Connelly*, 479 U.S. at 166 (citation omitted). The reliability of evidence "is a matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment." *Id.* at 167. "[T]he Constitution rightly leaves this sort of in-

quiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area." *Ibid.* *Connelly* therefore confirms that the Due Process Clause does not broadly regulate the introduction of unreliable evidence at a defendant's trial.

D. This Court Should Not Fashion A New Due Process Principle For Cases Involving Eyewitness Identification Testimony

Petitioner contends (Br. 17-22) that eyewitness identification evidence generally poses unique risks of wrongful convictions and that those risks cannot be addressed through the normal criminal trial process. He is mistaken.

1. The concerns petitioner raises about eyewitness identifications are not new. The Court recognized the potential fallibility of eyewitness identification in *Wade* and in several decisions since then, but it has not found those concerns sufficient to justify due process scrutiny of all identification evidence. See *Wade*, 388 U.S. at 228-229; see also, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 472-473 (1980). Rather, the Court recognized that it was "the influence of improper suggestion" by the police that poses a special risk of "miscarriages of justice." *Wade*, 388 U.S. at 229 (citation omitted); see *United States* v. *Owens*, 484 U.S. 554, 561 (1988) (declining to assume that "out-of-court statements of identification are inherently less reliable than other out-of-court statements" in the absence of police suggestion).

The social science sources petitioner cites (Br. 17-22) confirm that it is *police* suggestion in formal confrontations such as lineups and showups that raises special reliability concerns. See, *e.g.*, Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go*

Wrong 49, 51-62 (2011); Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 10-15 (2009). Moreover, as petitioner recognizes (Br. 17-20), the increasing use of new forms of reliable and probative evidence, such as DNA evidence, has served as an important check on mistaken eyewitness identification evidence. See, *e.g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 129 S. Ct. 2308, 2316 (2009) ("DNA testing can provide powerful new evidence unlike anything known before."). Accordingly, recent developments have not undercut the Court's rule that absent unnecessary police suggestion that fatally taints reliability, identification evidence is "for the jury to weigh." *Brathwaite*, 432 U.S. at 116.

2. The Sixth Amendment provides criminal defendants with ample opportunity to test the accuracy of eyewitness identification evidence, and the Court should not create an extra due process check to ensure the defendant's trial is fair. The "first line of defense," the Court has explained, is the right to the assistance of counsel at lineups and showups conducted after the initiation of adversary proceedings. *Wade*, 388 U.S. at 235. The presence of counsel at the lineup helps to "prevent[] * * * unfairness" in the way the police present the suspect to the witness. *Ibid.* And at trial, defense counsel may test the accuracy of an identification through cross-examination, "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, *Evidence* § 1367 (James H. Chadbourn rev. ed. 1974). The "central concern" of the Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant." *Maryland* v. *Craig*, 497 U.S. 836, 845 (1990).

With respect to eyewitness identification evidence in particular, the Court has stated that "[w]hile identification testimony is significant evidence, such testimony is still only evidence," and "[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification." *Brathwaite*, 432 U.S. at 114 n.14 (quoting *Clemons* v. *United States*, 408 F.2d 1230, 1251 (1968), cert. denied, 394 U.S. 964 (1969)); see, *e.g.*, *Simmons*, 390 U.S. at 384 ("The danger that use of [an identification procedure] may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error."). "The testimony of an eyewitness is almost uniquely subject to effective cross-examination. In nearly any type of identification case, the areas for inquiry will be limited only by counsel's experience and imagination." Lawrence Taylor, *Eyewitness Identification* 228 (1982). It is only when police influence on a witness has created a serious and irreparable risk of mistaken identification—one that cannot be cured by normal operation of the adversary process—that the Court has found the type of fundamental unfairness that raises due process concerns. *Brathwaite*, 432 U.S. at 116. "Short of that point," the Court has concluded, "such evidence is for the jury to weigh." *Ibid.*; see, *e.g.*, *United States* v. *Scheffer*, 523 U.S. 303, 334-335 (1998) ("[E]ven highly dubious eyewitness testimony is, and should be, admitted and tested in the crucible of cross-examination." (Stevens, J., dissenting)).

The opportunity for cross-examination is "further buttressed * * * by the requirement that the state prove every element of the crime, including the identity of the accused beyond a reasonable doubt," *State* v.

Pailon, 590 A.2d 858, 863 (R.I. 1991), as well as the due process guarantee that a conviction must be supported by constitutionally sufficient evidence, meaning evidence that would "convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense," *Jackson* v. *Virginia*, 443 U.S. 307, 316-317 (1979).

3. Other, non-constitutional features of our adversary system provide additional checks against convictions based on unreliable identification evidence. The rules of evidence require that eyewitness testimony be relevant and competent. See Fed. R. Evid. 401-402, 601; see also, *e.g.*, Fed. R. Evid. 602 (requirement that witnesses testify from personal knowledge), 701 (exclusion of opinion testimony of lay witness not rationally based on witness's perception). Trial courts may exclude evidence that is so patently untrustworthy that it falls below the threshold of competency. See Fed. R. Evid. 601; N.H. R. Evid. 601. An identification also may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Fed. R. Evid. 403; N.H. R. Evid. 403.

Moreover, any danger that the jury may give undue weight to a possibly unreliable identification "can be * * * guarded against by appropriate jury instructions." *United States* v. *Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972). Most of the federal circuits have provided an instruction about eyewitness testimony in their model instructions for criminal trials.[5] Numerous States have

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[5] See 3d Cir. Crim. Jury Instruction 4.15 (2010); *United States* v. *Holley*, 502 F.2d 273, 277-278 (4th Cir. 1974); 5th Cir. 2001 Crim. Jury Instruction 1.29; 6th Cir. Pattern Crim. Jury Instruction 7.11 (2011); Pattern Crim. Fed. Jury Instruction for the 7th Cir. 3.08 (1998); Manual of Model Crim. Jury Instructions for the District Courts of the 8th Cir. 4.08 (2011); 9th Cir. Model Crim. Jury Instruction 4.11 (2010); 10th Cir.

likewise provided such model instructions to guide their juries.[6] There is a "strong presumption that juries will follow the[se] instructions." *Scheffer*, 523 U.S. at 336 (plurality opinion). Thus for identification testimony, like any other testimony, the defense can fully test reliability using the many tools available at trial, and the court can appropriately instruct the jury about its possible shortcomings and ensure the verdict is supported by sufficient admissible evidence.

4. Creating a new due process rule for identification testimony that was not influenced by police suggestion would frustrate the administration of justice because it would lead to the exclusion of relevant, probative evidence at trial, without any corresponding benefit of deterring certain police conduct. The Court justified a limited due process rule regarding identification testimony on the ground that it would lead police to "guard against

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Crim. Pattern Jury Instruction 1.29 (2011); 11th Cir. Pattern Jury Instruction (Crim. Cases) Special Instruction 3 (2010); *United States* v. *Telfaire*, 469 F.2d 552, 558-559 (D.C. Cir. 1972).

[6] See, *e.g.*, Rev. Ariz. Jury Instruction - Crim. 39 (3d ed. 2008); 1 Judicial Council of Cal. Crim. Jury Instruction 315 (2010); Conn. Crim. Jury Instruction 2.6-4 (2007); 2 Ga. Suggested Pattern Jury Instruction (Crim. Cases) 1.35.10 (4th ed. 2011); Ill. Pattern Jury Instruction Crim. 3.15 (4th ed. 2011); Pattern Instructions for Kan. - Crim. 52.20 (3d ed. 2011); 1 Md. Crim. Jury Instructions & Commentary §§ 2.56, 2.57A, 2.57B (David E. Aaronson ed., 3d ed. 2009); Mass. Crim. Model Jury Instruction 9.160 (2009); 10 Minn. Jury Instruction Guides, Crim. 3.19 (5th ed. 2006); N.H. Crim. Jury Instruction 3.06 (1985); N.Y. Crim. Jury Instruction "Identification—One Witness" and "Identification—Witness Plus" (2d ed. 2011); 1 Pa. Suggested Standard Crim. Jury Instruction 4.07B (2d ed. 2010); Okla. Uniform Jury Instruction Crim. 9-19 (2d ed. 2009); Tenn. Crim. Pattern Jury Instruction 42.05 (14th ed. 2010); Utah Model Jury Instruction CR404 (2d ed. 2010); Model Instructions from the Vt. Crim. Jury Instruction Comm. 5-601, 5-605 (2003); W. Va. Crim. Jury Instruction 5.05 (6th ed. 2003).

unnecessarily suggestive procedures." *Brathwaite*, 432 U.S. at 112. Keeping an identification that was not obtained by the police from the jury would "serve absolutely no purpose in enforcing constitutional guarantees," *Connelly*, 479 U.S. at 162, 166, and would impose an "enormous societal cost" by "excluding truth in the search for truth in the administration of justice," *Nix* v. *Williams*, 467 U.S. 431, 445 (1984). It would provide a windfall to defendants when witnesses, through no fault of the government, happen to see defendants on television, in a newspaper, or standing near a police officer.

Petitioner's proposal also would diminish the role of the jury in our adversary system. In *Watkins* v. *Sowders*, 449 U.S. 341 (1981), the Court held that the Constitution does not require a court to conduct a hearing outside the jury's presence about possible police suggestion during a lineup or showup because "the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform." *Id.* at 347. Indeed, "the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of the evidence." *Ibid.* Our entire legal system "is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses." *Ventris*, 129 S. Ct. at 1847 n.*. If juries are considered incompetent to evaluate eyewitness testimony, it is difficult to know what they are competent to do.

Finally, petitioner's proposal would invite the courts to constitutionalize the rules of evidence. "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness." *Brathwaite*, 432 U.S. at 113-114 n.14 (citation omitted). If the Court were to adopt a special rule for eyewitness

identification evidence not obtained by the police, no doubt criminal defendants would argue that other types of potentially unreliable evidence—such as confidential informant testimony or testimony of a cooperating co-conspirator—also raise due process concerns. And it would make the Court "a rule-making organ for the promulgation of state rules of criminal procedure"—a role the Court has so far rejected. *Medina* v. *California*, 505 U.S. 437, 443 (1992) (citation omitted). Further, it would "short-circuit" the efforts of federal and state law enforcement officers, legislatures, and courts to address potential concerns about eyewitness identification testimony. *Osborne*, 129 S. Ct. at 2322; see, *e.g.*, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* iii (Oct. 1999) (describing "improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system"); *State* v. *Henderson*, No. A-8-08 (062218), 2011 WL 3715028, at *46-47 (N.J. Aug. 24, 2011) (adopting additional procedures for eyewitness identifications under the state constitution); see also, *e.g.*, 725 Ill. Comp. Stat. Ann. 5/107A-5 (2006); N.C. Gen. Stat. Ann. § 15A-284.52 (2009); Ohio Rev. Code Ann. § 2933.83 (2010); W. Va. Code Ann. § 62-1E-1 to -3 (2010); Wis. Stat. Ann. § 175.50 (2006).

5. This case makes clear that the special due process rule petitioner suggests is not needed. Petitioner had ample opportunity to test Blandon's identification of him at trial. Defense counsel vigorously cross-examined Blandon about her ability to identify petitioner, pointing out that she saw him from "quite a distance," J.A. 226a; that her view of him was partially blocked by a van, *ibid.*; that she did not describe his facial features or clothing, J.A. 233a; that she may not have been paying close attention to him because she was "scared," *ibid.*; and that she

was unable to pick him out from a photographic array, J.A. 234a-235a. During closing argument, defense counsel urged the jury not to credit Blandon's identification for these reasons. J.A. 374a-375a.

The trial court then gave the jury a special instruction regarding eyewitness evidence. The court stated that the jurors should consider the witness's "capacity and * * * opportunity to observe the person in question at the time of the crime," including such factors as distance, lighting, and the witness's attentiveness. J.A. 399a. The court stressed that "[i]f [an] identification was influenced by the circumstances under which it was made, you should examine the identification with great care." J.A. 400a. So instructed, the jury considered the evidence (which, in addition to Blandon's identification, included Ullon's two identifications of petitioner) and found petitioner guilty. Here, the police had no influence in generating the identification and petitioner had an ample opportunity to challenge the identification at trial. A new due process rule to supplant existing procedures is unwarranted.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

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Graham v. *Florida*, 130 S. Ct. 2011 (2010) 1

Manson v. *Brathwaite*, 432 U.S. 98 (1977) 2, 5, 13

Neil v. *Biggers*, 409 U.S. 188 (1972) 2, 3, 5, 13, 19

Panetti v. *Quarterman*, 551 U.S. 930 (2007) 1

Simmons v. *United States*, 390 U.S. 377 (1968) 2

State v. *Clopten*, 223 P.3d 1103 (Utah 2009) 18

State v. *Dubose*, 699 N.W.2d 582 (Wis. 2005) 22

State v. *Rich*, 549 A.2d 742 (Me. 1988) 11

Stovall v. *Denno*, 388 U.S. 293 (1967) 5, 22

United States v. *Curry*, 977 F.2d 1042 (7th Cir. 1992) 21

United States v. *Luis*, 835 F.2d 37 (2d Cir. 1987) 19

United States v. *Moore*, 786 F.2d 1308 (5th Cir. 1986) 21

United States v. *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) 20

United States v. *Wade*, 388 U.S. 218 (1967) 5, 14, 18, 22

Watkins v. *Sowders*, 449 U.S. 341 (1981) 5

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Bartlett, Sir Frederick Charles, *Remembering: A Study in Experimental and Social Psychology* (1932) 6-7

Behrman, Bruce W. & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 Law & Hum. Behav. 475 (2001) 15

Borchard, Edwin M., *Convicting the Innocent* (1932) 14

Brewer, Neil, et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. Experimental Psychol. Applied 44 (2002) 19

Brigham, John C. & Robert K. Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19 (1983) 17, 18

Brigham, John C., et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. Personality & Soc. Psychol. 673 (1982) 16

Brigham, John C., et al., *Disputed Eyewitness Identification Evidence*, 36 Ct. Rev. 12 (1999) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Castelli, Paola, et al., *Evaluating Eyewitness Testimony in Adults and Children*, in *The Handbook of Forensic Psychology* 243 (Irving B. Weiner & Allen K. Hess eds., 3d ed. 2006) 7

Cutler, Brian L., *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327 (2006) 9

Cutler, Brian L. & Steven Penrod, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185 (1990) 18

Cutler, Brian L. & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) 16, 20

Cutler, Brian L., et al., *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. Applied Soc. Psychol. 1197 (1990) 20

Deffenbacher, Kenneth, et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004) 10

Deffenbacher, Kenneth, et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139 (2008) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Dysart, Jennifer E. & R.C.L. Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method?*, in 2 *The Handbook of Eyewitness Psychology* 141 (R.C.L. Lindsay et al. eds., 2007) 22-23

Frankfurter, Felix, *The Case of Sacco and Vanetti: A Critical Analysis for Lawyers and Laymen* (1927) 22

Garrett, Brandon L., *Judging Innocence*, 108 Colum. L. Rev. 55 (2008) 14

Green, Edith, *Judge's Instruction on Eyewitness Testimony*, 18 J. Appl. Soc. Psychol. 252 (1988) 20

Gross, Samuel R., et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005) 14

The Innocence Project—Know The Cases, http://www.innocenceproject.org/know/ (last visited Aug. 5, 2011) 14

Kassin, Saul M., et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405 (2001) 9, 23

Kassin, Saul M., et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony*, 44 Am. Psychologist 1089 (1989) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Krafka, Carol & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 58 (1985) 16

Lindsay, R.C.L. & Gary L. Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 Law & Hum. Behav. 303 (1980) 24

Lindsay, R.C.L., et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79 (1981) 18

Loftus, Geoffrey & Erin M. Harley, *Why Is It Easier To Identify Someone Close Than Far Away?*, 12 Psychonomic Bull. & Rev. 43 (2005) 11

Loftus, Elizabeth, et al., *Eyewitness Testimony: Civil and Criminal* (4th ed. 2007) 6, 7, 8, 24, 25

Meissner, Christian A. & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol. Pub. Pol'y & L. 3 (2001) 12

Meissner, Christian A., et al., *Person Descriptions as Eyewitness Evidence*, in 2 *The Handbook of Eyewitness Psychology* 1 (R.C.L. Lindsay et al. eds., 2007) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Memon, Amina, et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 British J. Psychol. 339 (2003) 10

Morgan, Charles A., et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265 (2004) 10

O'Rourke, Thomas E., et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 Law & Hum. Behav. 385 (1989) 12

Pezdek, Kathy, *Content, Form, and Ethical Issues Concerning Psychological Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 29 (Brian L. Cutler ed., 2009) 11

Phillips, Mark R., et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. Applied Psychol. 940 (1999) 24

Pigott, Melissa A., et al., *A Field Study of the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. Police Sci. & Admin. 84 (1990) 16

Platz, Stephanie J. & Harmon M. Hosch, *Cross Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972 (1988) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Report of the Special Master, *State* v. *Henderson*, No. A-8-08 (N.J. June 18, 2010), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF (last visited Aug. 5, 2011) 13

Schmechel, Richard S., et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177 (2006) 9

Shapiro, Peter N. & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139 (1986) 10

Sigler, Jennifer N. & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143 (2002) 18

Slater, A., *Identification Parades*, Police Research Group, Home Office Study (London 1994) 15

Steblay, Nancy, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413 (1992) 12

Steblay, Nancy, et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Hum. Behav. 523 (2003) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Valentine, Tim, et al., *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 Applied Cognitive Psychol. 969 (2003) 15

Wells, Gary L., *Applied Eyewitness-Testimony Research*, 36 J. Personality & Soc. Psychol. 1546 (1978) 8

Wells, Gary L., *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615 8

Wells, Gary L. & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998) 19

Wells, Gary L. & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1 (2009) 11, 13, 19

Wells, Gary L. & Elizabeth A. Olsen, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277 (2003) 5

Wells, Gary L., et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45 (2006) 8, 11-12, 19

Wright, Daniel B. & Anne T. McDaid, *Comparing System and Estimator Variables Using Data from Real Line-Ups*, 10 Applied Cognitive Psychol. 75 (1996) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Wright, Daniel B. & Elin M. Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 Psychol. Sci. 172 (2007) 15

Yarmey, A. Daniel, et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 Law & Hum. Behav. 459 (1996) 23

INTEREST OF AMICUS CURIAE

The American Psychological Association (APA) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, it has approximately 155,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.[1]

APA has filed more than 135 amicus briefs in state and federal courts around the country. These briefs have been cited frequently by courts over the years, including this Court. *See, e.g.*, *Graham* v. *Florida*, 130 S. Ct. 2011, 2026 (2010); *Panetti* v. *Quarterman*, 551 U.S. 930, 962 (2007); *Atkins* v. *Virginia*, 536 U.S. 304, 316 n.21 (2002).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient scientific research, data, and literature relevant to a question before the court that APA can usefully contribute

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[1] Both parties' written consent to the filing of this brief is being submitted contemporaneously. No counsel for a party authored this brief in whole or in part, and no person other than APA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

to the court's understanding and resolution of that question. APA regards this as one of those cases.[2]

SUMMARY OF ARGUMENT

I.A. Accurate eyewitness identifications are a crucial part of the truth-seeking process. But identifications can be inaccurate, and the admission into evidence of inaccurate identifications can violate a criminal defendant's due process rights. Several decades ago, this Court established a framework for courts to address claims that a particular identification should be excluded from evidence because it was both made under suggestive circumstances and bears insufficient independent indicia of reliability, *i.e.*, probable accuracy. In doing so, the Court made clear that "[r]eliability is the linchpin in determining the admissibility of identification testimony," *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977), and that "the primary evil to be avoided" is the "'likelihood of ... misidentification,'" *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) (quoting *Simmons* v. *United States*, 390 U.S. 377, 384 (1968)). Here, however, the New Hampshire Supreme Court imposed an additional condition—that state actors improperly caused an identification to be made under suggestive circumstances—before any due process inquiry can be made.

In considering the propriety of that additional requirement, this Court should take account of extensive psychological research, much of it conducted since 1977,

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[2] APA gratefully acknowledges the assistance of Steven Penrod, J.D., Ph.D.; Gary Wells, Ph.D.; Jennifer Dysart, Ph.D.; Nancy Steblay, Ph.D.; Kirk Heilbrun, Ph.D.; David DeMatteo, J.D., Ph.D.; and Lori Butts, J.D., Ph.D., in the preparation of this brief.

which shows that the presence or absence of state action in creating any suggestiveness is frequently irrelevant to "the primary evil to be avoided," *i.e.*, the "likelihood of ... misidentification." *Biggers*, 409 U.S. at 198. In particular, this research has identified many factors bearing on the reliability of an eyewitness identification that are independent of the conduct of law enforcement. These include the passage of time between observation and identification; the level of stress experienced by the witness during the crime; the duration of the witness's exposure to the perpetrator; the distance between the witness and the perpetrator; the perpetrator's brandishing of a weapon at the crime scene; and racial differences between the witness and the perpetrator. The fact that reliability—the "linchpin" of admissibility—is affected by so many factors unrelated to state action calls into serious question requiring state action as a prerequisite for due process scrutiny of identifications.

B. The risk of inaccurate eyewitness identifications is not merely a theoretical possibility. Controlled experiments as well as studies of actual identifications have consistently found that the rate of incorrect identifications is approximately 33 percent. This high error rate provides further reason not to immunize an entire category of identifications from any due process scrutiny.

C. The problem of unreliable identifications cannot be adequately addressed by allowing such identifications into evidence and then relying on cross-examination, jury instructions, or expert testimony to avoid wrongful conviction. Research shows that juries tend to "over believe" eyewitness testimony, making jury reliance on even unreliable identifications likely. Research also shows that jury instructions are typically ineffective (and in any event largely within the discre-

tion of trial courts to give or deny). Expert testimony is likewise within the discretion of trial courts, and exclusions of it are often upheld on appeal under a deferential standard of review. Finally, cross-examination can do little to affect a witness who is being entirely truthful but whose identification is nonetheless incorrect.

II. The identifications that the decision below immunizes from due process scrutiny—those that involve suggestiveness but not state action—are particularly likely to lead to false identifications. As this case demonstrates, it is one-on-one identifications, as opposed to line-ups or photo arrays, that are most likely to involve suggestiveness but not state action. But when made under suggestive circumstances, as here, one-on-one identifications present the most troubling features of "show-ups," a form of one-on-one identification in which police affirmatively present a single suspect to a witness and request an identification. Like show-ups—which this court has recognized create serious risks of erroneous identification—other one-on-one identifications communicate to the eyewitness that the police believe the lone suspect to be the culprit. And, in contrast to lineups, they do not offer "incorrect" choices, which can serve as a safeguard with an eyewitness who opts to make an identification despite being uncertain. The decision below thus immunizes from due process scrutiny identifications that pose a serious risk of inaccuracy.

ARGUMENT

I. SCIENTIFIC RESEARCH SUPPORTS DUE PROCESS INQUIRY INTO THE RELIABILITY OF ALL EYEWITNESS IDENTIFICATIONS MADE UNDER SUGGESTIVE CIRCUMSTANCES

A. Many Factors That Affect The Accuracy Of Eyewitness Identifications Are Unrelated To Police Conduct

Eyewitness testimony is often a critical part of the truth-seeking process. Accurate eyewitness identifications can provide powerful evidence of guilt or innocence. This Court and others, however, have long recognized that eyewitness identifications are often *in*accurate. *See, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known[.]"). This Court has further held that the admission of an identification that is likely inaccurate can violate a criminal defendant's due process right to a fair trial. *See Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process[.]").

Building on these principles, this Court, in a series of cases decided between 1967 and 1977, established a framework for addressing claims that an eyewitness identification was made under such suggestive circumstances that due process requires its exclusion from evidence. *See Manson* v. *Brathwaite*, 432 U.S. 98 (1977); *Biggers*, 409 U.S. 188; *Stovall* v. *Denno*, 388 U.S. 293 (1967). Of particular note, this Court held that reliability—*i.e.*, probable accuracy—"is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114; *accord Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) ("It is the reliability of identification evidence that primarily determines its admissi-

bility."). Here, however, the New Hampshire Supreme Court concluded that government-created suggestiveness is a linchpin of admissibility, holding that a court need not even inquire into the reliability of an identification unless state actors improperly caused the identification to be made under suggestive circumstances.

In considering this additional limitation on due process scrutiny, this Court should be take account of a large body of psychological research, much of it conducted since 1977, that has identified a host of factors bearing on the accuracy of an eyewitness identification. Many of these factors, several of which are discussed in detail below, are independent of the conduct of law-enforcement officials (and, indeed, independent of suggestiveness from any source). Hence, government-created suggestiveness is not a proper proxy for reliability. Rather, there is a risk of erroneous identification—and of a resulting conviction of an innocent person—even when state actors do not orchestrate suggestive identification circumstances. The New Hampshire Supreme Court's conclusion that state-created suggestiveness is a prerequisite for a court even to consider the reliability of an eyewitness identification derogates the focus on accuracy that lies at the core of this Court's relevant precedent.

1. Cognitive psychologists have long "established that when we experience an important event, we do not simply record it in our memory as a videotape recorder would." Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 2-2, at 12 (4th ed. 2007). This finding traces its origin to the 1930s work of Frederic Charles Bartlett. Through a series of experiments, Bartlett debunked the notion that "remembering is ... the re-excitation of innumerable fixed, lifeless and fragmentary traces." Bartlett, *Remembering: A Study in Ex-*

perimental and Social Psychology 213 (1932). Instead, the process of remembering "is an imaginative reconstruction or construction.... It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]" *Id.* Inaccuracies are common, because the process of remembering necessitates the active processing of sensory inputs through the individual's pre-existing cognitive patterns, patterns that are not infallible. As one more recent commentary explained, "human perception does not work like a camera or video recorder. Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual's state of mind or the nature of the event observed." Brigham et al., *Disputed Eyewitness Identification Evidence*, 36 Ct. Rev. 12, 13 (1999). Bartlett's "reconstructive" analysis enjoys widespread acceptance in the scientific community. *See, e.g.*, Castelli et al., *Evaluating Eyewitness Testimony in Adults and Children*, in *The Handbook of Forensic Psychology* 243, 244 (Weiner & Hess eds., 3d ed. 2006).

Psychologists analyzing the nature of memory have focused on its three discrete steps: (1) the acquisition or encoding stage, when a witness perceives an event and information is thereby entered into the memory system; (2) the retention or storage stage, the period between acquisition and the witness's attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. *See* Loftus et al., *Eyewitness Testimony* § 2-2, at 13. "This three-stage analysis is central to the concept of human memory," and "[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages." *Id.* Those psychologists have identified in particular numerous factors that may adversely affect an eyewitness's mem-

ory at each stage. At the acquisition stage, memory is subject to both event-specific variables (such as duration of the event) and witness-specific variables (such as age). *Id.* At the retention stage, additional factors such as the passage of time or post-event information may contaminate the witness's memory. *Id.* Finally, at the retrieval stage, the witness's memory may be negatively affected by the method of questioning or the witness's confidence level. *Id.*[3]

2. Building on this body of research regarding the nature of memory generally, psychologists have conducted a large number of empirical studies—most using controlled experimental methods—that document the adverse impact of various factors on the accuracy of eyewitness identification. Researchers have long divided these variables into two categories: "estimator variables," those that are beyond the control of state actors, and "system variables," those that are not. *See, e.g.*, Wells, *Applied Eyewitness Testimony Research*, 36 J. Personality & Soc. Psychol. 1546, 1548 (1978). Due to the breadth and depth of this research, almost any overview of it is necessarily incomplete.[4] But the following recitation of several factors underscores that

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[3] Because memory is subject to many sources of contamination, researchers have recommended that it be regarded by the criminal-justice system as similar to a fingerprint, hair sample, or other trace evidence from a crime scene. *See, e.g.*, Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622-623.

[4] More extensive discussions appear in, for example, Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 51-68 (2006); and Wells & Olsen, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 280-290 (2003).

many of them are unrelated to the conduct of law-enforcement officials.[5]

a. Passage of Time. Empirical research establishes that as time passes between an event and an associated identification, the identification becomes increasingly unreliable—put simply, the memory "decays." *See, e.g.*, Deffenbacher et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139, 147-148 (2008). Importantly, "[t]he decay function is not linear; rather, greater decay occurs early on and the rate of decay lessens over time." Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 336 (2006). Even a gap of only a few hours between exposure and identification, then, can affect the reliability of an identification.

b. Witness Stress. The level of stress experienced by an eyewitness at the time of exposure to the perpetrator can also affect the reliability of a subsequent identification. One "meta-analysis"—an analysis of data from a cross-section of prior studies—found "clear

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[5] Eyewitness science is widely accepted within the scientific community, and its key findings are largely uncontroversial. *See, e.g.*, Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 180 (2006) ("[E]yewitness reliability research today is an established body of knowledge. It uses well-accepted methodologies. It is part of the research agenda at major universities throughout the world. It is a subject of thousands of peer-reviewed publications. It has existed for decades[, and t]here is nearly unanimous consensus among researchers about the field's core findings[.]"); Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001) (illustrating consensus among experts).

support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy." Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 694 (2004) (analyzing 27 studies). Another study, involving participants at military survival schools who were exposed to genuine stress, similarly found "robust evidence that eyewitness memory for persons encountered during events that are ... highly stressful[] ... may be subject to substantial error." Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265, 274 (2004). Being the victim of a crime is of course a stressful experience.

c. Exposure Duration. Studies have similarly demonstrated that the reliability of an eyewitness identification diminishes when the witness sees the perpetrator for only a short period of time. One study, for example, found an accuracy rate of 85 to 95 percent when subjects were exposed for forty-five seconds to the image of the perpetrator during a videotaped reconstruction of robbery, and a subsequent photo array contained the perpetrator. But that rate fell to between 29 and 35 percent when the exposure lasted only twelve seconds. *See* Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 British J. Psychol. 339, 345 tbl. 1 (2003); *see also* Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 140, 150 (1986) (conducting a meta-analysis of 128 existing studies involving nearly 17,000 subjects and finding a linear

trend in the relationship between exposure duration and identification accuracy).[6]

d. Distance. As everyday experience tells us, clarity of vision decreases with distance. Experimental research provides specifics about this relationship between distance and the ability to identify faces. The research reveals that—for people with normal vision—this ability begins to diminish at approximately 25 feet, and nearly disappears by approximately 150 feet. *See* Loftus & Harley, *Why Is It Easier To Identify Someone Close Than Far Away?*, 12 Psychonomic Bull. & Rev. 43, 63 (2005), *cited in* Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 9-10 (2009); *see also* Meissner et al., *Person Descriptions as Eyewitness Evidence*, in 2 *The Handbook of Eyewitness Psychology* 1, 3 (Lindsay et al. eds., 2007).

e. Weapon Focus. Weapon focus "refers to the visual attention eyewitnesses give to a perpetrator's weapon during the course of a crime"—attention that is "expected ... [to] reduce his or her ability to later recall details about the perpetrator or to recognize the perpetrator." Wells et al., *Eyewitness Evidence: Improving*

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[6] Notably, the study discussed in the text controlled for many of the other factors discussed herein. Both the 85 to 95 percent and 29 to 35 percent figures therefore likely overstate the accuracy of real-world identifications: Research has shown that the various factors that affect eyewitness accuracy often interact to compound the risk of mistaken identification. *See* Pezdek, *Content, Form, and Ethical Issues Concerning Psychological Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 29, 37 (Cutler ed., 2009).

Its Probative Value, 7 Psychol. Sci. in Pub. Int. 45, 53 (2006). Several studies, including a meta-analysis, have found that weapon focus has a statistically significant adverse impact on eyewitness identification accuracy. *See* Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 420 (1992); O'Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 Law & Hum. Behav. 385, 392 (1989).

f. Cross-Race Bias. Finally, extensive empirical research demonstrates that eyewitnesses are more accurate at identifying perpetrators of their own race than those of a different race. For example, a 2001 meta-analysis that spanned 39 research articles and nearly 5,000 participant witnesses concluded that cross-race identifications are 56 percent more likely to be erroneous than same-race identifications. *See* Meissner & Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol., Pub. Pol'y & L. 3, 15, 21 (2001).

The point here is not that state actors can never contribute to inaccuracy. They certainly can.[7] Nor is the point that any eyewitness identification affected by one or more of these factors is necessarily flawed or inaccurate. The point is simply that eyewitness reliability—the linchpin of admissibility under this Court's precedent—is not determined by the presence or absence of state-created suggestiveness. It is instead determined by numerous factors identified by scientific

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[7] For example, they can make leading statements during photo arrays or line-ups, arrange arrays or line-ups in which only one of the choices resembles a prior description of the perpetrator, or have a witness participate in multiple line-ups or arrays.

research, many of which (the estimator variables) have nothing to do with the conduct of law enforcement. Eyewitness testimony can be unreliable even where there is no state-created suggestiveness. Conversely, eyewitness testimony can be reliable even when suggestiveness (state-created or otherwise) does exist, for example, where other factors reinforce the accuracy of an identification made in circumstances that otherwise would be questionable. Put simply, the decision below immunizes some identifications from any due process scrutiny without regard to many of the factors that bear on what this Court has held to be the key point regarding admissibility.[8]

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[8] In *Biggers* and *Manson*, this Court enumerated five factors relevant to the probable accuracy of an eyewitness identification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson*, 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199-200). As shown by the discussion in the text, most of these factors are indeed relevant to probable accuracy—with the notable exception of witness certainty, *see infra* n.14. But given that notable exception, and given the plethora of other accuracy-related factors that researchers have identified since *Biggers* and *Manson*, APA urges the Court, in an appropriate case, to revisit the *Manson* framework so as to bring it in line with current scientific knowledge. *See* Wells & Quinlivan, 33 Law & Hum. Behav. at 21 ("*Manson* was a reasonable proposition in 1977, but we know much more today."); Report of the Special Master, *State* v. *Henderson*, No. A-8-08, at 77-79 (N.J. June 18, 2010) (listing several shortcomings with the *Manson* framework in concluding that it is not "valid and appropriate in light of recent scientific and other evidence"), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF (last visited Aug. 5, 2011).

B. False Identifications Are A Common Occurrence

That the various factors that can cause eyewitness error have actually resulted in false identifications is not simply a theoretical possibility. Indeed, more than four decades ago this Court observed that "the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228. Studies released as early as 1932 and as recently as 2008 confirm that observation, documenting wrongful convictions that rest largely or wholly on eyewitness identifications. *See, e.g.*, Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (of the first 200 cases of post-conviction exoneration by DNA, nearly 80 percent included at least one eyewitness who mistakenly identified the innocent defendant); Borchard, *Convicting the Innocent* xiii (1932) ("[T]he major source of these [65 wrongful convictions] is an identification of the accused by the victim.").[9]

These anecdotal accounts have been supplemented with systematic research into the prevalence of erroneous identification. First, researchers have conducted a variety of studies of actual witness identifications. These studies have consistently found that the rate of

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[9] Although DNA testing for innocence claims has been available only since the early 1990s—and only a small fraction of cases are suitable for testing because DNA was not collected, has deteriorated, or was lost or destroyed—proven post-conviction DNA exonerations in the United States exceed 270. *See The Innocence Project—Know The Cases*, http://www.innocenceproject.org/know/ (last visited Aug. 5, 2011); *see also* Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 524, 529 & tbl. 1 (2005) (noting 196 non-DNA exonerations between 1989 and 2003 alone).

inaccurate identifications is roughly 33 percent. For example, one analysis of 1,561 identification attempts by witnesses viewing line-ups in England found that 39 percent correctly identified the suspect, 20 percent incorrectly identified a "filler," and 41 percent made no identification—meaning that at least 33.9 percent of the identifications were wrong (20 percent divided by 59 percent, with the denominator being those who made *some* identification, correct or incorrect). *See* Wright & McDaid, *Comparing System and Estimator Variables Using Data from Real Line-ups*, 10 Applied Cognitive Psychol. 75, 77 tbl. 1 (1996).[10] A similar result was reached through an analysis of 843 identification attempts in England by witnesses viewing line-ups: The suspect was correctly identified 36 percent of the time, a filler was incorrectly identified 22 percent of the time, and no identification was made 42 percent of the time—an inaccuracy rate of at least 37.9 percent (22 percent divided by 58 percent). *See* Valentine et al., *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 Applied Cognitive Psychol. 969, 970 (2003) (citing Slater, *Identification Parades*, Police Research Group, Home Office Study (London 1994)).[11] Archival studies thus yield the alarming find-

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[10] The percentage of incorrect identifications is "at least" 33.9 percent because whenever the suspect identified by the police is not actually the culprit, a "correct" identification of the suspect by the witness is not truly a correct identification, *i.e.*, not an identification of the culprit.

[11] *Accord* Behrman & Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 Law & Hum. Behav. 475, 480-482 (2001) (study of 58 line-ups in California found a 32.4 percent inaccuracy rate); Wright & Skagerberg, *Post-identification Feedback Affects Real Eyewitnesses*, 18 Psychol. Sci. 172, 175 (2007) (inaccuracy rate of 26.6 percent).

ing that approximately one of every three identifications is wrong.

Controlled field experiments have produced similar misidentification rates. Several studies collectively "gathered [data] ... from 291 mock-eyewitnesses who were administered 536 separate identification tests." Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 12 (1995).[12] In some of the tests, the "target," *i.e.*, the person who had interacted with the eyewitness, was included, while in others the target was absent. In tests that did not include the target, eyewitnesses nonetheless made an inaccurate identification 35.8 percent of the time. *Id.*; *see generally id.* at 10-14.[13]

These high rates of inaccurate eyewitness identifications underscore the need for courts to be hesitant about immunizing from due process scrutiny any identi-

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[12] These studies utilized non-violent scenarios that were brief but involved unusual conduct by the customer. *See, e.g.*, Platz & Hosch, *Cross Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972, 975 (1988) (customer attempt to pay in Mexican pesos); Pigott et al., *A Field Study of the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. Police Sci. & Admin. 84 (1990) (customer attempt to pay with "crudely altered ... money order"). The delay between interaction and identification ranged from two to twenty-four hours. *Compare* Krafka & Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 58, 62 (1985) (testing both two-hour and twenty-four-hour delays), *with* Platz & Hosch, 18 J. Applied Soc. Psychol. at 975 (two hours).

[13] The relevant studies are those cited in footnote 13, as well as Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. Personality & Soc. Psychol. 673, 674-676 (1982).

fications that are currently subject to such scrutiny. Yet the New Hampshire Supreme Court's rule would immunize an entire category of suggestive identifications, for reasons that, as discussed, are unrelated to what this Court has deemed the linchpin for admissibility. The risk that this approach would lead to the admission of inaccurate identifications provides an additional reason to reverse the judgment below.

C. Traditional Tools Of The Adversary System Cannot Be Relied Upon To Overcome The Prejudicial Effect Of Incorrect Eyewitness Identifications

Respondent or its amici may assert that to the extent the New Hampshire Supreme Court's rule would allow the admission of many unreliable identifications, that can be addressed with traditional tools of the adversary system, such as cross-examination, jury instructions, or expert testimony. Scientific research and recent experience cast doubt on that claim.

As an initial matter, it is important to emphasize the extent to which eyewitness identifications are "over believed" by juries, because that phenomenon makes clear that the admission of unreliable identifications is highly problematic. In a seminal 1983 study, researchers presented individuals with crime scenarios derived from previous empirical studies and asked the individuals to predict the accuracy rate of eyewitness identifications observed in the studies. *See* Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 22-24 (1983). On average, nearly 84 percent of respondents overestimated the accuracy rates of identifications. *See id.* at 28. Moreover, the magnitude of the overestimation was significant. For example, the

study's respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification. *See id.* at 24. Other studies confirm that jurors routinely "over believe" eyewitness testimony. *See, e.g.*, Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (conviction rate by mock juries increased from 49 percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary). Even when unreliable eyewitness identification is admitted, therefore, juries are quite likely to believe it.

Cross-examination cannot be relied on to address this problem. As this Court has observed, "even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." *Wade*, 388 U.S. at 235. That is particularly true in this context: What most affects jurors' assessment of a particular eyewitness identification is the level of confidence expressed by the witness. *See* Cutler & Penrod, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 185 (1990); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79, 83 (1981). And cross-examination is largely useless with a mistaken (albeit honest) eyewitness who is very confident and consistent. *See, e.g.*, *State* v. *Clopten*, 223 P.3d 1103, 1110 (Utah 2009) ("Cross-examination will often expose a lie or half-truth, but may be far less effective

when witnesses, although mistaken, believe that what they say is true.").[14]

Jury instructions on the potential fallacies of eyewitness identifications are similarly inadequate to address the problem of unreliable identifications. To begin with, no decision of this Court holds that such instructions are constitutionally required when requested. It is thus often (though not always) left to the discretion of trial judges to decide on a case-by-case basis whether to give any such instructions. *See, e.g.*, *United States* v. *Luis*, 835 F.2d 37, 41 (2d Cir. 1987) (noting that several circuits, "including this Circuit,

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[14] Jurors' evident belief that eyewitness confidence correlates with accurate identifications was once shared by many in the judiciary. Indeed, in *Biggers* this Court stated, albeit without citing any scientific authorities, that confidence is an indication of accuracy. *See* 409 U.S. at 199-200. Subsequent research, however, has called this notion into very serious question. As one report concluded, "[t]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29." Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002). Even these various correlation figures are likely overestimates, moreover, because the confidence of eyewitnesses in actual cases, unlike in controlled experiments, may be infected by positive feedback received in the investigative process (for example, an officer stating during a photo array or line-up, "good, you identified the suspect"). *See supra* n.6; *see also* Wells et al., 7 Psychol. Sci. in Pub. Int. at 45; Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374 (1998). Indeed, witness confidence can be affected by a host of factors that have no relation to reliability. *See, e.g.*, Wells & Quinlivan, 33 Law & Hum. Behav. at 11-12.

have left the matter [of eyewitness-related instructions] to the trial court to be determined in the exercise of its discretion" (citing cases)). Moreover, researchers have tested the impact of eyewitness-related instructions on jurors' decision-making. *See* Cutler & Penrod, *Mistaken Identification* at 255-268 (summarizing studies). They have found that a common eyewitness-related instruction "proved completely ineffective at sensitizing jurors to eyewitness evidence." *See* Cutler et al., *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. Applied Soc. Psychol. 1197, 1198-1200, 1202-1206 (1990).[15] Other studies have found likewise. *See* Green, *Judge's Instruction on Eyewitness Testimony*, 18 J. Applied Soc. Psychol. 252, 260 (1988) ("Jurors who heard [a commonly given] instruction were no more sensitive to factors known to be problematic to eyewitness identification than were jurors who had no instruction.").

Finally, expert testimony regarding eyewitness science, and in particular regarding the accuracy factors discussed above, can help juries to better understand eyewitness testimony (and its limits), and thus reduce the incidence of wrongful convictions based on inaccurate identifications. But as is true of jury instructions, this Court has not held that expert testimony on eyewitness reliability must be admitted when proffered (assuming it otherwise meets the requirements of Rule 702). And although most courts have rejected a per se ban on such testimony, state and federal appellate

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[15] The instruction, which runs approximately ten paragraphs, was approved for use by federal courts in the District of Columbia Circuit in *United States* v. *Telfaire*, 469 F.2d 552, 558-559 (D.C. Cir. 1972) (per curiam).

courts frequently sustain a trial judge's exclusion of it, employing deferential review. *See, e.g.*, *United States* v. *Curry*, 977 F.2d 1042, 1051-1052 (7th Cir. 1992); *United States* v. *Moore*, 786 F.2d 1308, 1312-1313 (5th Cir. 1986); *State* v. *Rich*, 549 A.2d 742, 743-744 (Me. 1988) ("On two previous occasions, we have found no abuse of discretion in the trial court's determination that the effects of stress on eyewitness reliability were not beyond the common knowledge of the ordinary juror.... [T]he trial justice is vested with broad discretion and the exclusion of Dr. Bishop's testimony in this case was not an abuse of that discretion."). It thus cannot be deemed a sufficient safeguard against the dangers of unreliable identifications.

II. THE NEW HAMPSHIRE SUPREME COURT'S RULE INSULATES FROM DUE PROCESS SCRUTINY PROCEDURES THAT ARE PARTICULARLY LIKELY TO LEAD TO FALSE IDENTIFICATIONS

Many of the identifications that the rule adopted by the New Hampshire Supreme Court insulates from due process scrutiny are particularly likely to be inaccurate.

A. The identifications that the judgment below insulates will typically result from circumstances in which the witness had the opportunity to view only one person, and to say whether or not that person was the culprit. (These are referred to hereafter as one-on-one identifications.) That is because identification procedures in which more than one individual is viewed—such as line-ups and photo arrays—by their nature almost invariably require significant police involvement. One-on-one identifications, in contrast, may occur spontaneously, as this case illustrates. But as explained below, such identifications pose risks of inaccuracy as sig-

nificant as those made as a result of suggestive police procedures.

No identification procedure has been more roundly condemned for being inherently suggestive—and hence leading to inaccurate identifications—than "show-ups," a type of one-on-one identification in which police affirmatively present a suspect to a witness and ask for an identification. This Court itself observed decades ago that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned." *Stovall*, 388 U.S. at 302. Indeed, the Court observed in another case that same day, "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *Wade*, 388 U.S. at 234 (citing Frankfurter, *The Case of Sacco and Vanzetti* 31-32 (1927)); *accord, e.g.*, *State* v. *Dubose*, 699 N.W.2d 582, 593-594 (Wis. 2005) ("[E]vidence obtained from an out-of-court showup is inherently suggestive.").

Psychological research confirms these observations, demonstrating that show-ups are more likely than other procedures to produce an erroneous identification. In one meta-analysis of studies comparing line-ups and show-ups (involving over 3,000 total witnesses), researchers found that show-ups produce twice as many false identifications as fair line-ups. *See* Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Hum. Behav. 523, 532 (2003); *accord* Dysart & Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method?*, in Lindsay et al., 2 *The Handbook of Eyewitness Psychology* 137,

141 (Lindsay et al. eds., 2007).[16] Survey research reinforces these experimental results: Experts in eyewitness psychology generally agree that "[t]he use of a one-person showup instead of a full lineup increases the risk of misidentification." Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 408 tbl. 1, 411-412 tbls. 3-4 (2001); *see also* Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony*, 44 Am. Psychologist 1089, 1093 tbl. 3 (1989).[17]

B. The identification at issue in this case did not involve a traditional show-up, *i.e.*, an affirmative presentation of a suspect to a witness by police. Instead, the one-on-one identification occurred by happenstance. But the two principal reasons that show-ups more frequently produce inaccurate identifications extend to

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[16] The time gap between the witnessed event and the attempted identification significantly affects this disparity. When the gap is less than two hours, the disparity is essentially nonexistent, whereas with a twenty-four-hour gap, show-ups are almost four times as likely to produce a misidentification. *See* Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 Law & Hum. Behav. 459, 465 (1996).

[17] The point here is not that show-ups have no proper place in law enforcement. To the contrary, they can be a valuable fact-finding procedure if proper precautions are taken to minimize their suggestiveness and due account is given to the potential unreliability of the witnessing conditions. For example, when properly employed show-ups can lead to the prompt release of innocent suspects. But when they are instead carried out under suggestive circumstances and based on unreliable eyewitness observations, they create a substantial risk of a false identification. They are thus a procedure for which due process scrutiny is particularly important.

other forms of one-on-one identifications, such as the one here. Such identifications should thus not be allowed to escape due process scrutiny when they are made under suggestive circumstances.

First, unlike with line-ups and photo arrays, in show-ups, "the identity of the police suspect is [inherently] obvious." Loftus et al., *Eyewitness Testimony* § 4-7, at 91. Cognitively, then, the witness's task is not to select the culprit from a pool of candidates, but rather to confirm the police's determination that the suspect might be the culprit. *See id.*[18] And this inherent suggestiveness of show-ups exists with other one-on-one identifications, *i.e.*, even when the police do not arrange the witness-suspect confrontation. That is because what renders show-ups suggestive is simply the appearance that the police have identified the suspect as the culprit. And officers need not affirmatively present a suspect to a witness in order to create that appearance. To the contrary, almost any apparent connection between the police and a suspect may suffice. This case demonstrates as much: The police never presented petitioner to the witness, yet when she identified him he was standing with an officer who had arrived in response to her husband's call about the break-in. *See* Pet. 3, 5. Even when police do not deliberately

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[18] By comparison, "when the identity of a suspect is obvious in a line-up, the line-up is considered unfair." Loftus et al., *Eyewitness Testimony* § 4-7, at 92. That is so both as a matter of law, *see Foster* v. *California*, 394 U.S. 440, 442-443 (1969), and as a matter of science, *see, e.g.*, Lindsay & Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 Law & Hum. Behav. 303, 313 (1980); Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. Applied Psychol. 940, 941 (1999).

arrange a one-on-one identification, then, it may well be a suggestive procedure.

The second reason that show-ups yield more false identifications is that some witnesses opt to make a positive identification even if they are uncertain—perhaps out of a desire to assist law enforcement or because they take comfort in the belief that the perpetrator of a crime is in fact off the streets. With line-ups and photo arrays, these "guess" identifications will frequently result, as a matter of simple probabilities, in the selection of a person whom the police do not suspect (one of the "fillers" in a line-up, for example). *See* Loftus et al., ***Eyewitness Testimony*** § 4-7, at 92. But this safety valve is absent where a witness is given only one option: Even if the police have not identified the right person, that is the only person for the witness to identify. *See id.* In other words, a one-on-one identification, unlike a line-up or photo array, is not truly a test of a witness's memory, because it is impossible for the witness to "fail" the test by picking someone known not to be the perpetrator. And there is no reason to believe that the tendency of some witnesses to make an identification even if uncertain changes when a one-on-one identification is not a traditional show-up, *i.e.*, is not arranged by the police. Such identifications should not be categorically excluded from due process scrutiny.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be reversed.

Respectfully submitted.

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Supreme Court of the United States

BARION PERRY,

Petitioner,

vs.

NEW HAMPSHIRE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a criminal defendant challenges the reliability of an eyewitness identification, but the circumstances alleged to make it unreliable were not caused by any state action, is the admissibility of the identification controlled by the Due Process Clause of the Fourteenth Amendment, or is it solely a question of state evidence law?

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Burgett v. Texas, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967) 7, 14

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Chambers v. Mississippi, 410 U. S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 16

Colorado v. Connelly, 479 U. S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) 16, 17

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) 28

Donnelly v. DeChristoforo, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) 8, 9

Dowling v. United States, 493 U. S. 342,
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Estelle v. McGuire, 502 U. S. 62, 112 S. Ct. 475,
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Foster v. California, 394 U. S. 440, 89 S. Ct. 1127,
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Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792,
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Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111,
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Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774,
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Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280,
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Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489,
12 L. Ed. 2d 653 (1964) 8

Manson v. Brathwaite, 432 U. S. 98, 97 S. Ct. 2243,
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Marshall v. Lonberger, 459 U. S. 422, 103 S. Ct. 843,
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Mincey v. Arizona, 437 U. S. 385, 98 S. Ct. 2408,
57 L. Ed. 2d 290 (1978) 8

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340,
79 L. Ed. 791 (1935) 9, 10

Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U. S.) 272, 15 L. Ed. 372 (1856) 5

Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) 10

Neil v. Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) 10

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Patterson v. New York, 432 U. S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) 6, 14

Payne v. Arkansas, 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) 15

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Spencer v. Texas, 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) 6, 7, 9, 25

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State v. Madison, 109 N. J. 223, 536 A. 2d 254 (1988) 19

Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967) 9, 10, 11, 17, 22

United States v. Scheffer, 523 U. S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) 31

United States v. Telfaire, 469 F. 2d 552 (CADC 1972) 29

United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) 28

Walker v. Sauvinet, 92 U. S. 90, 2 Otto 90, 23 L. Ed. 678 (1876) 14

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Fed. Rule Evid. 401 25

Fed. Rule Evid. 402 25

Fed. Rule Evid. 403 26

N. H. Rule Evid. 401-403 26

Secondary Sources

Advisory Committee's Note to Fed. Rule Evid. 401, 28 U. S. C. App. 25

ALI, Model Code of Pre-Arraignment Procedure (1975) 23

Cutler, B., & Penrod, S., Mistaken Identification: The Eyewitness, Psychology, and the Law (1995) 30

Fisher, UAHuntsville Research Could Improve Reliability of Identifying Crime Suspects, UAHuntsville Research News (July 18, 2011), http://chargerpost.uah.edu/pages/studentnews.php?id=556 22

Friendly, In Praise of *Erie*, 39 N. Y. U. L. Rev. 383 (1964) 17

Gonzalez, Ellsworth, & Pembroke, Response Biases in Lineups and Showups, 64 J. Personality & Soc. Psychol. 525 (1993) 22

Green, Judge's Instruction on Eyewitness Testimony: Evaluation and Revision, 18 J. of Applied Psych. 252 (1988) 30

Malpass, Tredoux, & McQuiston-Surrett, Public Policy and Sequential Lineups, 14 Legal and Criminological Psychol. 1 (2009) .. 22

Martire & Kemp, Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects, 16 Legal & Criminological Psychol. 24 (2011) 29

McQuiston-Surrett & Malpass, Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, 12 Psychol. Pub. Pol'y & L. 137 (2006) 21

Steblay, Dysart, & Wells, Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion, 17 Psychol. Pub. Pol'y & L. 99 (2011) 18, 21

U. S. Dept. of Justice, National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement (Oct. 1999) 18, 19, 21

Wells, *et al.*, Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603 (1998) 20, 21, 22, 23, 24

Wells, Eyewitness Identification Evidence: Science and Reform, 29 Champion 12 (April 2005) 19, 21, 24

Wells, Olsen, & Charman, The Confidence of Eyewitnesses in Their Identifications From Lineups, 11 Current Directions Psychol. Sci. 151 (2002) 24

Wells, Rydell, & Seelau, The Selection of Distractors for Eyewitness Lineups, 78 J. Applied Psychol. 835 (1993) 23

IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

vs.

NEW HAMPSHIRE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The petitioner in this case seeks to expand the due process limitations on the admissibility of eyewitness

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

identification, an admittedly controversial category of evidence. Imposing further constitutional limits on evidence threatens to blur the boundary between protected constitutional rights and the rights of the States to establish and implement their own evidentiary procedures. Such constitutionalization of state evidentiary procedures is an unnecessary suppression of the States' rights to conduct their own criminal trials and is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are thoroughly stated in the briefs for Petitioner and Respondent. They are summarized here to frame the issues in this brief.

During the early morning hours of August 15, 2008, the Nashua Police Department received a report that a black male was attempting to break into vehicles located in the back parking lot of an apartment building. J. A. 82a-83a. Officer Nicole Clay arrived at the scene and observed a black male, later identified as Perry, standing between vehicles and holding two amplifiers. J. A. 37a-38a, 83a. When Officer Clay arrived at the parking lot, she heard a noise as if an aluminum baseball bat had fallen to the ground. J. A. 83a. Officer Clay asked Perry to put down the amplifiers and speak with her. J. A. 83a. Perry did so. He claimed he had found the amplifiers on the ground and was moving them, but that he had seen two "kids" leaving the parking lot. J. A. 83a. The amplifiers were later identified as belonging to Alex Clavijo, who said he had kept them in the trunk of his vehicle. J. A. 131a-133a; 163a-165a.

While Officer Clay spoke briefly with a man Perry indicated was one of the "kids" he had seen exiting the parking lot, Clavijo approached Officer Clay and said his neighbor, Nubia Blandon, had witnessed someone break

into his vehicle. J. A. 83a-84a. Officer Clay accompanied Clavijo into the apartment building to talk with Blandon, leaving Perry with another police officer, Officer Robert Dunn. J. A. 83a.

Blandon, through Clavijo as a translator, explained what she had seen to Officer Clay. J. A. 84a. Blandon said she had watched a tall black male look inside vehicles parked in the lot, circle Clavijo's car, open Clavijo's trunk, and remove a large item. J. A. 84a. Blandon said the man had been carrying a baseball bat. J. A. 84a. When Officer Clay asked for a more specific description, Blandon pointed through her apartment window and said the person she had seen was the man standing with the police officer in the parking lot. J. A. 84a. Perry was arrested and charged with theft by unauthorized taking and criminal mischief. J. A. 82a, 84a. At a subsequent photo array, Blandon was unable to identify Perry. J. A. 84a.

Perry moved to suppress Blandon's out-of-court identification, arguing it was obtained under unnecessarily suggestive circumstances. J. A. 12a. The trial court cited the state's "two-step test" for evaluating a due process challenge to an out-of-court identification: (1) whether the identification procedure was unnecessarily suggestive; and (2) if so, whether the identification procedure was so suggestive as to render the identification unreliable. J. A. 85a. The trial court concluded that, because Blandon's identification was not the result of any suggestive police technique, the identification was admissible and the court was not required to proceed to step number two to consider whether the identification was otherwise reliable. See J. A. 86a-87a.

At trial, Officer Clay testified as to Blandon's identification. J. A. 173a-174a. Perry was convicted of theft by unauthorized taking in a jury trial. J. A. 408a-409a. He appealed the conviction to the New Hampshire

Supreme Court, claiming the admission of Blandon's out-of-court identification violated Perry's rights under the Due Process Clause and the New Hampshire Constitution. J. A. 426a. The New Hampshire Supreme Court affirmed, citing the two-step test and concluding, as the trial court did, that the analysis did not apply under the circumstances because the potentially suggestive out-of-court identification was not the result of police conduct. J. A. 9a-11a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

Trial rights protected by the Due Process Clause have largely been limited to those explicitly guaranteed by another provision of the Constitution. Expanding due process rights under the "fundamental fairness" approach in criminal trials has been limited primarily to those circumstances where the jury is not given a full presentation of the case, and where additional safeguards are therefore needed to protect the defendant's rights. This Court should be wary of stretching this approach further.

Creating and implementing rules of evidence are matters of state concern. The Due Process Clause provides basic limitations, but federal courts should not unnecessarily interfere with the States' implementation of criminal procedures.

A standard of admissibility hinging on "reliability" is impractical. The theories addressing the reliability of eyewitness identification procedures have changed dramatically since the Court last revisited the issue. The science and psychology of eyewitness identifications is a field of continuous evolution. A rule of constitutional law cannot turn on something so unpredictable.

An identification that is questionable but not contrived is a legitimate brick in the prosecution's wall of evidence. Excluding evidence with some probative value merely because it might point the wrong direction is contrary to the foundation of modern evidence law. Exclusion of identification evidence on the theory that it is uniquely likely to mislead the jury would be justified only if it were proved that measures less than exclusion are not adequate and cannot be made adequate. That case has not been proved by the empirical studies to date.

ARGUMENT

I. This Court should be wary of untethered due process claims.

A. The Bill of Rights and "Fundamental Fairness."

Identifying the boundaries of "due process," specifically in the context of a criminal trial, has been a long-standing source of debate. See *Chambers* v. *Florida*, 309 U. S. 227, 235-236 (1940). A phrase that "antedates the establishment of our institutions," *Hurtado* v. *California*, 110 U. S. 516, 539 (1884) (Harlan, J., dissenting), the hundreds of years of legislation and litigation addressing the concept have nevertheless left it a nebulous one:

> "But is it 'due process of law'? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. . . . To what principles, then, are we to resort to ascertain whether this process . . . is due process?" *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U. S.) 272, 276-277 (1856).

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). Due process protects the "specific guarantees of the Bill of Rights" and "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Albright* v. *Oliver*, 510 U. S. 266, 282 (1994) (Kennedy, J., concurring in the judgment) (internal quotation marks omitted).

Trial errors that violate a criminal defendant's "due process" rights generally stem from the former category, that is, the right asserted is tethered to some explicit guarantee of the Constitution. "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 493 U. S. 342, 352 (1990). It "require[s] that only the most basic procedural safeguards be observed." *Patterson* v. *New York*, 432 U. S. 197, 210 (1977).

Justice Harlan's opinion for the Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967), is instructive. The state procedure under attack was Texas's practice of permitting the prosecution to admit a defendant's prior convictions during the guilt phase of trial, with appropriate limiting instructions to the jury. *Id.*, at 556. Rejecting the notion that this Court serves "as a rule-making organ for the promulgation of state rules of criminal procedure," the Court found it "impossible" to find that the Texas rule, while prejudicial to a defendant, violated the Due Process Clause. *Id.*, at 564.

Importantly, *Spencer* distinguished the due process claim in that case from the one presented in *Jackson* v. *Denno*, 378 U. S. 368 (1964). *Jackson* involved procedures to guarantee a specific federal constitutional right—the right against self-incrimination—and the

federal procedural requirements were imposed to implement that explicit right. See *Spencer*, 385 U. S., at 564-565. "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area, the Court has always moved with caution before striking down state procedures." *Id.*, at 565. Were the Court to proceed under the guise of "due process" to select a procedure for the proper use in state court of a defendant's past criminal convictions, the States' hands would be significantly tied.

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568-569.

Burgett v. *Texas*, 389 U. S. 109 (1967), provides an informative contrast with *Spencer*. In that case, one of the defendant's prior convictions had been entered in a case where the defendant had apparently not been represented by counsel. *Id.*, at 112-114. The ruling relied expressly on the holding of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), that the specific Sixth Amendment right to counsel was incorporated into the Fourteenth Amendment's Due Process Clause. See *Burgett*, *supra*, at 114. The Court quoted *Spencer*, and distinguished it on the ground that, unlike *Spencer*, the result in this case was prompted by a "specific federal right," not a general "fairness" approach. *Id.*, at 115-116.

Several other due process trial rights further demonstrate this pattern. *Doyle* v. *Ohio*, 426 U. S. 610 (1976), held that the use of a defendant's silence after receiving *Miranda* warnings for impeachment purposes violated the Due Process Clause. *Id.*, at 619. Use of a suspect's

silence under these circumstances "would be fundamentally unfair" in light of a suspect's Fifth Amendment rights and the "implicit" promise of those rights that a suspect's "silence will carry no penalty." See *id.*, at 618. This due process right did not stand on its own, but stood to give meaning to a protection already recognized as required by the Fifth Amendment, specifically "the right-to-remain-silent component of *Miranda*." See *Brecht* v. *Abrahamson*, 507 U. S. 619, 628 (1993).

The use of coerced confessions is similar. The admission of a defendant's involuntary confession is a violation of due process, see *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978), but this right is clearly tied to the Fifth Amendment right against self-incrimination. Since the incorporation of this right, see *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), in challenges to the admission of an allegedly coerced confession under the Fifth and Fourteenth Amendments, the Court has not been required to proceed with separate analyses for each claim. Admission of a defendant's coerced confession violates the explicit terms of the self-incrimination clause, and thus these rights are in effect synonymous. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U. S. 279, 282 (1991) ("Fifth and Fourteenth Amendments" mentioned at the beginning of the opinion, with no separate analysis thereafter).

Donnelly v. *DeChristoforo*, 416 U. S. 637 (1974), demonstrates this point with respect to the due process limitations of a prosecutor's closing argument. See *id.*, at 642. There, the prosecutor made two statements, acknowledged by the state court to be improper, about the defendant's guilt. *Id.*, at 638, 640. Reiterating the limited power of a federal court to review a state court trial proceeding, the Court noted that the prosecutor's remarks did not make this, "a case in which the State has denied a defendant the benefit of a specific provi-

sion of the Bill of Rights, . . . or in which the prosecutor's remarks so prejudiced a specific right . . . as to amount to a denial of that right." *Id.*, at 643. If a specific guarantee were involved, the Court reasoned, it would have taken "special care" to protect that right from the prosecutor's conduct. See *ibid.* Instead, the only claim made was that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process," a claim the Court concluded was not supported by the record. *Ibid.*

The Court is far less hesitant to find a state proceeding a violation of the Due Process Clause when it implicates an explicit constitutional guarantee. The other route, *i.e.*, the "fundamental fairness" approach, is risky because it threatens to allow this Court to "substitute[] [its] judgment of what is right for what the Constitution declares shall be the supreme law of the land." See *Stovall* v. *Denno*, 388 U. S. 293, 305 (1967) (Black, J., dissenting). This in turn threatens, in Justice Black's words, to turn this Court into "not a Constitution-interpreter, but a day-to-day Constitution-maker," see *ibid.*, or in Justice Stewart's words, a "roving commission to impose upon the criminal courts of [the states] [its] own notions of enlightened policy." *Spencer*, 385 U. S., at 569 (Stewart, J., concurring). This Court has consistently expressed that it does not seek to do so.

B. "Untethered" Due Process Rights.

A few untethered trial rights have been recognized as protected by the Due Process Clause. But these rights generally rise to the level of a due process violation because they transform the trial into a "pretense," see *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), that is, a proceeding in which the jury is not provided all the information it needs to reach a fair conclusion. The same is not true in the present case.

A conviction obtained by false evidence, known to be false, violates the Due Process Clause. *Ibid.* "[T]he fundamental conceptions of justice" cannot be fulfilled where the "State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury . . . ." *Ibid.* The same is true when the State fails to correct false evidence presented to the jury, even if the State did not solicit the evidence. See *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959).

As an "extension" of that ruling, it is likewise a due process violation for a prosecutor to withhold from a defendant favorable evidence that is material to guilt or punishment. *Brady* v. *Maryland*, 373 U. S. 83, 86-87 (1963). A criminal trial in which the prosecutor withholds such evidence "casts the prosecutor in the role of an architect of a proceeding." See *id.*, at 87-88. Like the rule declared in *Mooney*, the *Brady* rule seeks to prevent the state from "contriving" a conviction by misleading the jury. Such a manipulation of a criminal trial cannot be said to satisfy the principles of "fundamental fairness."

Under narrow circumstances, the admission of an improper identification can also violate a defendant's right to due process. In *Stovall*, *supra*, the Court recognized for the first time that the suggestiveness of an identification procedure "was anything other than a matter to be argued to the jury." See *Neil* v. *Biggers*, 409 U. S. 188, 199 (1972). The Court's discussion of the due process restrictions on eyewitness identifications in *Stovall* was brief and cursory, citing only a Fourth Circuit case for the proposition that an identification obtained by a procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification" could stand as an independent due process violation.

See *Stovall*, 388 U. S., at 301-302 (citing *Palmer* v. *Peyton*, 359 F. 2d 199 (CA4 1966)). The Fourth Circuit case drew a due process claim seemingly from thin air, citing search and interrogation cases that have nothing to do with identification procedures. See *Palmer*, *supra*, at 202, and nn. 7-11. This dictum in *Stovall* swept far broader than was necessary to resolve the issues in that case; the Court noted the existence of the right, then quickly went on to conclude that under the circumstances the identification procedure used was not a denial of due process. See *Stovall*, *supra*, at 301-302.

The actual holding of *Stovall* is squarely contrary to petitioner's thesis that due process turns on reliability alone. The showup procedure in that case was not one iota more reliable than the "widely condemned" showups, see *id.*, at 302, because the witness, Mrs. Behrendt, was in the hospital with 11 stab wounds requiring major, life-saving surgery. See *id.*, at 295. In all likelihood, that condition would make the identification less reliable. Yet the showup did not violate due process because it was necessary. See *id.*, at 302. Necessity has nothing to do with reliability. There was no due process violation because the police did nothing wrong. " 'No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room.' " *Ibid.* (quoting Court of Appeals opinion). Stovall thus holds that police misconduct in staging an unnecessarily suggestive identification is a necessary condition to a due process violation. But it is not a sufficient condition.

In subsequent cases, the Court clarified that a due process challenge to an *improper* identification is to be evaluated by the totality of the circumstances, weighing

the reliability of the identification against the "corrupting effect of the suggestive identification itself." See *Manson* v. *Brathwaite*, 432 U. S. 98, 114 (1977). Perry and supporting *amici* have made much of the Court's statement in *Manson* that "reliability is the linchpin in determining the admissibility of identification testimony . . . ." *Id.*, at 114. But this statement must be taken in context of the entire opinion. In saying this, the Court was rejecting a *per se* approach to unnecessarily suggestive identifications that would require exclusion of any identifications obtained by unnecessarily suggestive procedures "without regard to reliability." See *id.*, at 110. The Court instead selected a less severe approach, permitting admission of identifications that, while obtained by unnecessarily suggestive means, are nevertheless reliable. See *id.*, at 110, 114. Importantly, designation of "reliability" as the linchpin of admissibility did nothing to affect the first part of the analysis, *i.e.*, that the identification procedure used was improper. The State did not contest that element. "Petitioner at the outset acknowledges that 'the procedure used in the instant case was suggestive [because only one photograph was used] and unnecessary' [because there was no emergency or exigent circumstance]." See *id.*, at 109 (brackets in original). It was with this threshold condition undisputed that the Court held that "under all the circumstances of this case there is [not] 'a very substantial likelihood of irreparable misidentification,' . . . [and therefore] such evidence is for the jury to weigh." *Id.*, at 116.

Considering the cases just discussed, which involved circumstances under which the Court was willing to recognize a due process right borne from the "fundamental fairness" component of the Fourteenth Amendment, a pattern becomes clear—these rights are necessary to prevent deception of the jury. In those cases, the jury was not provided with everything it needed to

adequately evaluate the case against the defendant. A jury presented with false evidence, proffered or vouched for by a prosecutor who knows it to be false, reasonably believes the evidence to be true and cannot adequately evaluate its trustworthiness. A jury that is not presented with relevant and exculpatory evidence about the defendant's guilt due to the State's withholding of such is deprived of a full presentation of the case. And lastly, procedures staged by police for the purpose of obtaining an unreliable identification of the defendant misleadingly presents the jury with a deliberately tainted identification. The juries under these circumstances do not have an opportunity to fairly judge the strength of the case or the reliability of the evidence presented against the defendant because essential components of the case have been withheld.

Under circumstances like those in the present case, where the contested evidence is simply something of questionable reliability, nothing is withheld from the jury to prevent it from meaningfully evaluating the evidence. The jury here was presented with the factors of Blandon's identification that rendered it questionable, *e.g.*, the time of night, J. A. 160a-161a, 225a, the vagueness of Blandon's initial description of the person she had seen in the parking lot, J. A. 205a-206a; J. A. 233a-234a, and the fact that Perry was the only person standing in the parking lot, other than Officer Dunn, at the time of Blandon's identification. J. A. 174a. The jury heard that Blandon later could not identify Perry from a photo array. J. A. 234a-235a; J. A. 302a. Counsel for Petitioner had a full opportunity to cross examine Officer Clay and Blandon about the nature and circumstances of the out-of-court identification. The jury, with all the evidence before it, could then decide whether Blandon's identification was trustworthy or simply too unreliable to be believed. Any questions related to the strength of Blandon's identification go to

the weight of the evidence, not its admissibility. The admission of a purportedly weak item of evidence, as alleged here, does not infringe on the fairness of the proceeding. The trial court's admission of the evidence does not rise to the level of a due process violation, and the New Hampshire Supreme Court was correct in so holding.

II. Rules of evidence are within the province of the state and should not be dominated by federal regulations.

"Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker* v. *Sauvinet*, 92 U. S. 90, 93 (1876). Provided it comports with the explicit guarantees in the Bill of Rights and those limited principles that rise to the level of "fundamental," "[t]he State is free to regulate the procedure of its courts in accordance with its own conceptions of policy." *Brown* v. *Mississippi*, 297 U. S. 278, 285 (1936). "We do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution." *Burgett* v. *Texas*, 389 U. S. 109, 113-114 (1967).

This freedom includes the ability to regulate evidence, "and [the state's] decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Patterson* v. *New York*, 432 U. S. 197, 201-202 (1977) (citations omitted). The Due Process Clause therefore plays a limited role in evaluating rules of evidence. It "does not permit the federal courts to engage in a finely tuned review of the wisdom

of state evidentiary rules." *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983). It "has never been perverted so as to force upon the . . . States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946).

This Court has been wisely restrained in invoking the Due Process Clause to regulate evidentiary standards, refusing to unnecessarily meddle in states' evidentiary procedures and consistently harkening back to the underlying purpose of due process protections as promising only a basic foundation of rights to a criminal defendant. See, *e.g.*, *Lisenba* v. *California*, 314 U. S. 219, 228-229 (1941) ("The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process"); *Estelle* v. *McGuire*, 502 U. S. 62, 75 (1991) (evidence of prior abuse of deceased child and instructions on use of that evidence did not deny due process, citing *Lisenba*, *supra*, and *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974)).

In limited circumstances, distinguishable from those here, procedural due process restricts the evidence that may be admitted against a criminal defendant. But these instances are narrow and few, and largely leave evidentiary issues to be resolved by state courts and legislatures.

Admission of a coerced confession violates a criminal defendant's right to due process, as it "deprive[s] him of 'that fundamental fairness essential to the very concept of justice.'" *Payne* v. *Arkansas*, 356 U. S. 560, 567 (1958) (quoting *Lisenba*); see also *Brown*, 297 U. S., at 286. But coerced confessions stand in a category of their own, as this Court has recognized that confessions hold a unique evidentiary value. They are "like no other evidence. Indeed, 'the defendant's own confession

is probably the most probative and damaging evidence that can be admitted against him . . . .'" *Arizona* v. *Fulminante*, 499 U. S. 279, 296 (1991) (quoting *Bruton* v. *United States*, 391 U. S. 123, 139 (1968) (White, J., dissenting)).

Refusing to allow a defendant to present evidence critical to the defense that bears "persuasive assurances of trustworthiness," may violate the "traditional and fundamental standards of due process." *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). A criminal defendant's ability to present his or her case should not be so restricted by a mechanical application of evidentiary rules, when doing so would "defeat the ends of justice." *Ibid.* But in *Chambers*, the Court limited the finding of a due process violation to the specific combination of errors that had occurred, that is, where the strict application of Mississippi's "voucher" rule, which prohibits cross-examination of one's own witness, and hearsay rules significantly hindered the defendant's ability to show that another person committed the charged murder. *Id.*, at 295, 302. The Court stated, "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*, at 302-303.

Importantly, the Court has declined to use the Due Process Clause as a mechanism for blocking admission of other types of potentially unreliable evidence. *Colorado* v. *Connelly*, 479 U. S. 157 (1986), refused to extend due process protections to a defendant's confession induced by internal forces, such as a mental illness, as opposed to state coercion. See *id.*, at 167.

> "We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its

> own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e.g.*, Fed. Rule Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment." *Ibid.*

The notion that the due process clause encompasses evidentiary determinations at all is not rooted in the Constitution. As Justice Black noted in his dissent in *Stovall*,

> "No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of trial." *Stovall* v. *Denno*, 388 U. S. 293, 305 (1967) (Black, J., dissenting).

The admissibility of Blandon's identification in the present case should be governed by New Hampshire's evidentiary rules, not the jurisprudence of federal courts.

III. A standard of "reliability" is too unpredictable to be a constitutional rule.

"[A] court should not adopt a rule that is sure to promote uncertainty when a better expedient is available." Friendly, In Praise of *Erie*, 39 N. Y. U. L. Rev. 383, 387, n. 23 (1964). This is especially true when defining the scope of a constitutional rule that must guide prosecutors, defense attorneys, and judges in the admissibility of evidence. A standard hinging on the

"reliability" of eyewitness identifications does not come close. The proper methods for gathering such evidence have been the source of a "decades-long research effort," see Steblay, Dysart, & Wells, Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion, 17 Psychol. Pub. Pol'y & L. 99, 99 (2011), which has resulted in varying conclusions and recommendations.

In 1999, the Department of Justice issued a guide to assist law enforcement agencies in developing sound protocol for eyewitness identifications. See U. S. Dept. of Justice, National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement (Oct. 1999) (NIJ Guidelines). Developed by a group of over 30 police investigators, prosecutors, defense attorneys, and research professionals across the United States and Canada, the NIJ Guidelines sought to "identify, define, and assemble a set of investigative tasks that should be performed in every investigation involving eyewitness evidence to best ensure the accuracy and reliability of this evidence." NIJ Guidelines v-vi, 3.

The NIJ Guidelines itself acknowledged that its recommendations were based on a snapshot of "currently accepted scientific principles and practices," and that "[a]dvances in social science and technology will, over time, affect procedures used to gather and preserve eyewitness evidence." See NIJ Guidelines 3, 8. Its creators anticipated that new procedures and advancements in communication might require amending the guidelines. See NIJ Guidelines 8-9. For instance, "blind" identification procedures, those in which the investigator does not know the identity of the suspect, were recognized as "impractical" for some agencies to utilize in 1999, but the NIJ Guidelines noted that such procedures had been lauded by psychology researchers and were "a direction for future exploration." NIJ

Guidelines 9; cf. Wells, Eyewitness Identification Evidence: Science and Reform, 29 Champion 12, 18 (April 2005) (advocating for double-blind). The NIJ Guidelines also noted that "computer-based imaging systems and the Internet," will someday enable inter-departmental sharing of images, and that the recommended guidelines were not intended to "inhibit the development and field testing" of such future technologies. NIJ Guidelines 9. Thus, the NIJ Guidelines in effect admitted that the guiding principles to yield maximum reliability developed in 1999 might focus on different factors and look far different than those released five or ten years later.

A recent opinion of the New Jersey Supreme Court exemplifies the inherent problem with a constitutional standard based on "reliability." In 2006, the New Jersey Supreme Court ordered a review of the state's two-part "*Manson/Madison*"[2] test used to evaluate the admissibility of identification evidence, a test the state adopted soon after this Court's 1977 decision in *Manson* v. *Brathwaite*. *State* v. *Henderson*, No. A-8-08 (N. J., Aug. 24, 2011), p. 34 .[3] The New Jersey Supreme Court declared the "assumptions and other factors reflected" in the test no longer valid, and that the current test "does not provide a sufficient measure for reliability." *Id.*, at 107. The court called for a "revised framework" to approach the issue, suggesting a list of 13 variables "to evaluate the overall reliability of an identification and determine its admissibility." *Id.*, at 115-117. The court further noted that the suggested factors did not comprise an exhaustive list, recognizing "that scientific

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2. *Manson* v. *Brathwaite*, 432 U. S. 98 (1977); *State* v. *Madison*, 109 N. J. 223, 536 A. 2d 254 (1988).

3. Page number references are to the slip opinion, available at http://www.cjlf.org/files/Henderson.NJ.Supreme.pdf.

research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now." *Id.*, at 117. Having constitutionalized the issue under the state constitution, see *id.*, at 110, n. 10, the New Jersey Supreme Court has effectively assumed the role of a continuing commission to revise identification procedure. Perhaps it can discharge this function for the state adequately, but it is doubtful this Court could do so for the nation, given its other responsibilities.

The changeable nature of the science is reflected in scientific literature. The earliest set of published recommendations for lineup procedures was released in 1967 in the American Criminal Law Quarterly. Wells, *et al.*, Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603, 610 (1998). A series of published guidelines followed. See *id.*, at 610-612. Years later, however, experts recognized that while the previous guidelines were "well intentioned," "often recommendations were made that either were or are inconsistent with what we know now based on empirical research findings" of states conducted during the 1980s and 1990s. *Id.*, at 612.

Several specific aspects of identification procedures illustrate the ongoing debate among researchers in identifying the most accurate method, including sequential versus simultaneous procedures, lineups versus showups, the selection of "fillers," and the value of eyewitness confidence.

A. Sequential v. Simultaneous Procedures.

"A sequential procedure is one in which the eyewitness views one lineup member at a time, deciding whether or not that person is the culprit before seeing

the remaining lineups." Wells, *et al.*, 22 Law & Hum. Behav., at 617. A simultaneous procedure displays all the members at the same time. Though the 1999 NIJ Guidelines noted support for sequential procedures within the scientific community, it did not indicate a preference for one method over the other and included recommendations for both types of procedures. NIJ Guidelines 9, 33-37.

The "status quo" for more than a century has been the simultaneous lineup. Steblay, *et al.*, 17 Psychol. Pub. Pol'y & L., at 124. However, sequential procedures have been gaining favor with researchers and are required in some jurisdictions. See *id.*, at 129-130. The researchers who favor them contend that sequential procedures reduce the likelihood of "relative judgments," the theory that witnesses tend to identify the person in the lineup that looks most like the culprit as compared to the other persons in the lineup. Wells, *et al.*, 22 Law & Hum. Behav., at 613, 617. "When compared to the usual simultaneous procedure, it is clear that the sequential procedure produces a lower rate of mistaken identifications (in perpetrator-absent lineups) with little loss in the rate of accurate identifications (in perpetrator-present lineups)." *Id.*, at 639.

This view is not unanimous, however. Many experiments have been conducted to determine whether sequential procedures produce more accurate results, Wells, 29 Champion, at 14, and the results have varied. One report noted that the data from some studies may not be generalized, and that "the sequential superiority effect may vary as a function of study methodology." See McQuiston-Surrett & Malpass, Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, 12 Psychol. Pub. Pol'y & L. 137, 157 (2006); but see Steblay, *et al.*, 17 Psychol. Pub. Pol'y & L., at 103. "Finding superior eyewitness identification tech-

niques for law enforcement is a work in progress." Malpass, Tredoux, & McQuiston-Surrett, Public Policy and Sequential Lineups, 14 Legal and Criminological Psychol. 1, 11 (2009).

B. Lineups v. *Showups.*

In *Stovall*, the Court recognized that the practice of showups, or showing suspects singly to an eyewitness, "has been widely condemned," citing several scholarly articles. *Stovall*, 388 U. S., at 302, and n. 6; see also *Simmons* v. *United States*, 390 U. S. 377, 383-384 (1968). One study concluded that showups failed to meet its recommended guidelines for the appropriate structure of a lineup or photospread because they may "convey to the eyewitness which person is the suspect." Wells, *et al.*, 22 Law & Hum. Behav., at 631.

But this result is not universal. Another study suggests that that showups might be preferable to lineups because they prevent the "relative judgment" problem described above. See Gonzalez, Ellsworth, & Pembroke, Response Biases in Lineups and Showups, 64 J. Personality & Soc. Psychol. 525, 536 (1993). And the research is continuing; the National Science Foundation recently awarded a $305,000 grant for a project studying the merits of lineups and showups. Fisher, UAHuntsville Research Could Improve Reliability of Identifying Crime Suspects, UAHuntsville Research News (July 18, 2011), http://chargerpost.uah.edu/pages/studentnews.php?id=556. The researcher believes showups may not be inherently overly suggestive, and that the manner in which they are conducted might be the source of any reliability problems. *Ibid.*

C. Selection of Fillers.

A lineup procedure naturally requires the participation of other persons, and the characteristics of these

"fillers," is important to the reliability of the identification. See, *e.g.*, *Foster* v. *California*, 394 U. S. 440, 442-443 (1969) (noting that in a lineup procedure, the defendant's height and clothing stood out from the fillers). But what are the criteria for selecting fillers? "In general, the psychological literature has argued that the distractors in a lineup should match the description of the culprit that was given previously by the eyewitness who will view the lineup." Wells, Rydell, & Seelau, The Selection of Distractors for Eyewitness Lineups, 78 J. Applied Psychol. 835, 835 (1993). But others have argued a better distractor is one who resembles the suspect in the lineup, rather than one who resembles the witness's prior description of the culprit.[4] See *ibid.* The American Law Institute in an early set of guidelines also recommended that a lineup generally include "a reasonable number of [persons] whom are similar in dress and appearance to the person to be identified." ALI, Model Code of Pre-Arraignment Procedure § 160.2(1), pp. 76-77 (1975).

D. Eyewitness Confidence.

The confidence of the eyewitness in making the identification has long been viewed as an important measure of its reliability. See Wells, *et al.*, 22 Law & Hum. Behav., at 619. This Court explicitly referenced "the level of certainty demonstrated at the confrontation," as one of the factors to be considered in evaluating the reliability of an identification. See *Manson* v. *Brathwaite*, 432 U. S., at 114. Mock-jury studies show

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4. Wells, Rydell, and Seelau provide a useful clarification for the terms "suspect" and "culprit" used throughout the literature on this issue: "The suspect might or might not be the culprit (*i.e.*, actual perpetrator); that is the very question one is trying to answer by conducting the lineup." Wells, Rydell, & Seelau, 78 J. Applied Psychol., at 836.

that jurors tend to believe witnesses who exude confidence in their identifications, at times even ignoring the surrounding conditions of the procedure if the witness was very confident. Wells, *et al.*, 22 Law & Hum. Behav., at 621. Studies on the relation between confidence and accuracy do show an overall positive correlation, but the relationship is complex, depending on a variety of factors. See Wells, *et al.*, 22 Law & Hum. Behav., at 622. A witness's confidence may be bolstered from factors other than the strength of his or her memory, such as repeated questioning, identifications from co-witnesses, or the reaction of the person administering the identification procedure. See Wells, *et al.*, 22 Law & Hum. Behav., at 624-626; Wells, 29 Champion, at 17-18; see also Wells, Olsen, & Charman, The Confidence of Eyewitnesses in Their Identifications From Lineups, 11 Current Directions Psychol. Sci. 151 (2002). Thus one of the commonly accepted means of evaluating reliability, specified by this Court as a factor and followed by state and federal courts since then, is not as straightforward as previously believed.

The above discussion is not intended to be a comprehensive report of the current status of eyewitness identifications in the research world. It is merely to show that the "best" protocol for identification procedures is not clear. Certainly, there are trends and a general consensus with respect to some aspects, such as the preference for lineups over showups, but even these beliefs are not set in stone. The research and theories are not solid enough on which to rest a constitutional standard. The rules for identification procedures are best left in the hands of the states, who can modify their rules of identification admissibility as the science evolves.

Lastly, even if the scientific and investigative community could agree on a process for obtaining the more

reliable identifications, the courts are not commanded to accept the procedure as a requirement of due process.

> "To say that [a procedure] is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment." *Spencer* v. *Texas*, 385 U. S. 554, 567-568 (1967).

IV. A questionable but uncontrived identification is a legitimate brick in the prosecution's wall of evidence.

Under the Federal Rules of Evidence, relevant evidence is admissible unless excluded by a specific rule, see Rule 402, and relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The Advisory Committee explained,

> "The standard of probability under the rule is 'more * * * probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, '*A brick is not a wall*,' or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine, '* * * [I]t is not to be supposed that every witness can make a home run.' " Advisory Committee's Note to Fed. Rule Evid. 401, 28 U. S. C. App., p. 325 (emphasis added).

In addition to specific rules of exclusion, the trial judge has discretion to exclude evidence, among other reasons, because it is unduly prejudicial. See Fed. Rule Evid. 403. These basic rules of evidence have been widely copied in the states, including New Hampshire. See N. H. Rule Evid. 401-403.

To qualify for this general rule of admissibility, an item of evidence need only push the overall probabilities in one party's favor, not establish proof by itself. Evidence that is "unreliable" in the sense that it *might* point in the wrong direction is nonetheless admissible, unless excluded by a specific rule or by the judge under Rule 403, if it has the requisite effect on the overall probabilities. Examining a party's evidence brick by brick, and tossing each brick out because it is not a wall, is contrary to the foundation of modern evidence law.

The facts of the present case illustrate the cumulative probability nature of evidence and McCormick's metaphor:

1. Officer Clay encountered Perry in a parking lot with Clavijo's amplifiers in his hands, J. A. 163a, probably because he stole them, possibly because his story about moving them out of traffic as a Good Samaritan was true. J. A. 342a.

2. Officer Clay heard a metallic clang as she approached Perry, J. A. 162a, and she saw an aluminum baseball bat on the ground, J. A. 175a, probably because Perry dropped the bat, possibly because someone else did. J. A. 200a.

3. Perry had a tool in his pocket, identified by Clavijo as the tool he kept in his car, J. A. 136a, 189a, probably because he had just taken it from Clavijo's car, possibly because he carried the same kind of tool for fixing his bicycle, J. A. 315a, and the similarity is just a coincidence.

4. Joffrey Ullon, Nubia Blandon's husband, identified Perry as the person walking around the parking lot looking into cars, both on the scene and in a photo lineup, J. A. 241a-242a, probably because he really is, possibly because Ullon was mistaken, perhaps in part because he assumed the person talking to the police officer was the culprit.

5. Nubia Blandon identified Perry at the scene as the person she saw taking the amplifiers out of Clavijo's car, J. A. 173a, probably because he really is, possibly because she was mistaken, perhaps in part because she assumed the person talking to the police officer was the culprit.

In a hypothetical civil case of *Clavijo* v. *Perry*, with a preponderance standard, Item 1 might be sufficient proof by itself, but Items 1-3 certainly would. The probability of the less likely explanation for each fact, small enough individually, becomes very small when all are considered together. For the actual criminal case of *State* v. *Perry*, with a burden of proof beyond a reasonable doubt, a jury would be justified in returning a guilty verdict with just these items, but some juries might find this evidence insufficient. Ullon's identification, which Perry did not challenge, makes the case stronger, but conceivably some jurors might still not be convinced.

At this point, the challenged identification provides one more brick in the wall of evidence. While it is possible that Blandon's spontaneous identification was mistaken, the probability of mistake is far less than the probability of correctness. This was not a "show-up" in the usual sense of the word. The police did not bring Perry to Blandon and ask if he was the culprit. Perry was not in handcuffs or otherwise visibly under arrest.

J. A. 86a.[5] He was just standing with a police officer, as Blandon herself was.

On a calm and correct assessment of the probative value of the evidence under Rule 401, the identification makes Perry's guilt more probable than it would be without the identification. Some special justification would be required to take this evidence out of the usual rules that relevant evidence is admissible and that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 596 (1993).

Petitioner claims that eyewitness identification has "such a powerful effect on jurors as to make the result of the trial a foregone conclusion," Brief for Petitioner 13, relying on Justice Brennan's opinion for the Court in *United States* v. *Wade*, 388 U. S. 218, 235-236 (1967). *Amicus* NACDL claims that " 'the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination.' " Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 9 (quoting *Watkins* v. *Sowders*, 449 U. S. 341, 356-357 (1981) (Brennan, J., dissenting)). But this Court is being asked to make a permanent constitutional rule of exclusion of relevant evidence, immune from amendment by the normal legislative and rule-making processes as our knowledge advances. See Part II, *supra*. Exclusion of relevant evidence is a drastic measure, to be taken only if no alternative is adequate. Such a rule should require, at the very least, a solid empirical foundation.

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5. Perry was not, in fact, arrested until after the identification. See Brief for Petitioner 5.

Amicus American Psychological Association (APA) attempts to provide this empirical basis, but its efforts come up short. It may well be that jurors relying only on their personal experience give excessive weight to eyewitness identification, but there is no need to limit them to personal experience.

Two methods of improving the jury's evaluation of eyewitness testimony, rather than suppressing it, are instructions from the judge and expert testimony. The literature on these methods discusses improvements in terms of jury confusion, jury sensitivity, and jury skepticism. Confusion needs no explanation. "Juror *sensitivity* is a 'desirable effect' . . . . Jurors who show sensitivity demonstrate an ability to weigh and combine factors likely to influence the quality of an identification allowing them to differentiate between identifications of varying quality." Martire & Kemp, Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects, 16 Legal & Criminological Psychol. 24, 25 (2011). "The term skepticism refers to a less desirable situation . . . where expert evidence results in a 'tendency to doubt or to disbelieve an eyewitness's testimony' as a direct result of the expert's evidence . . . ." *Id.*, at 26 (citations omitted).

The APA brushes off instructions claiming, "[t]hey have found that a common eyewitness-related instruction 'proved completely ineffective at sensitizing jurors to eyewitness evidence.' " Brief for American Psychological Association as *Amicus Curiae* 20 (APA Brief) (quoting Cutler *et al.*, Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence, 20 J. Applied Soc. Psychol. 1197, 1205 (1990)). The "common" instruction referred to is an antique, the one from *United States* v. *Telfaire*, 469 F. 2d 552, 558-559 (CADC 1972) (*per curiam*), predating almost all of the research in the field. In fact, almost all the research in the sur-

vey APA cites is on the efficacy of this one instruction. See B. Cutler & S. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 255-264 (1995). A finding that one antiquated instruction is ineffective is a far cry from a finding that instruction in general is hopeless.

Research with different instructions has been sparse. One experiment with a revision of the *Telfaire* instruction produced more acquittals but not necessarily more accurate decisions, possibly because of a defense bias in the wording. Green, Judge's Instruction on Eyewitness Testimony: Evaluation and Revision, 18 J. of Applied Psych. 252, 269 (1988). Another experiment added to the instruction "a commentary on the psychological findings regarding eyewitness identification." Cutler & Penrod, *supra*, at 257. "[T]his experiment produced evidence that judges' instructions produce skepticism. It might also be the case that the instructions improved sensitivity, but there is no way to tell given the design of the experiment." *Ibid.*

Remarkably, it appears that researchers have largely abandoned efforts to determine if simply educating jurors on the factors that affect eyewitness identification reliability is effective. Certainly the possibility cannot be dismissed on the current state of the evidence.

To the extent that *amicus* Innocence Network argues that vigorous development of improved instructions should proceed under courts' general authority to properly instruct juries, see Brief for Innocence Network as *Amicus Curiae* 17-22, CJLF agrees. See *State* v. *Henderson*, No. A-8-08 (N. J., Aug. 24, 2011), pp. 127-128 (directing preparation of new instructions). That point is no help to petitioner, who seeks a suppression remedy as a matter of federal constitutional law.

With regard to expert testimony, particularly, APA concedes that such testimony "can help juries to better understand eyewitness testimony (and its limits), and thus reduce the incidence of wrongful convictions based on inaccurate identifications." APA Brief 20. The only contrary argument the APA can muster is that this Court "has not held that expert testimony on eyewitness reliability must be admitted when proffered . . . ." *Ibid.* They should have said "has not *yet* held . . . ." Such a holding, if necessary, would be far less intrusive and far less damaging than the rule proposed in this case. If exclusion of such testimony "infringe[s] upon a weighty interest of the accused" it would be "unconstitutionally arbitrary or disproportionate." See *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998). Requiring such testimony routinely would, of course, be expensive, but it could be justified if it were proved that improved instructions cannot do the job.

Quite obviously, a categorical rule of exclusion of evidence would achieve whatever reduction in wrongful convictions it might yield at the heavy cost of a large number of wrongful acquittals. If there were no other way, bearing that cost might be the correct policy choice, whether it is constitutionally required or not. But the case has not been proved that there is no better way. Jury instructions different from those disparaged in the APA's decades-old research, see APA Brief 20, might be better. Expert testimony might be better.

Even as a matter of general evidence law, the principle stated in *Daubert*, *supra*, should govern courts' handling of "admissible but shaky" evidence until a powerful case has been made that a specialized rule of exclusion is necessary. That case has not been made. For this Court to impose a rule of exclusion as a constitutional mandate would require an even stronger case,

for the reasons explained in Part II, *supra*. That case has certainly not been made.

CONCLUSION

The decision of the New Hampshire Supreme Court should be affirmed.

September, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

BRIEF OF *AMICI CURIAE* WILTON DEDGE, HERMAN ATKINS, JENNIFER THOMPSON, AND MICHELE MALLIN IN SUPPORT OF PETITIONER

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CASES

Dedge v. State,
442 So.2d 429 (Fla. Ct. App. 1983) 18, 19, 20

Manson v. Brathwaite,
432 U.S. 98 (1977) 13, 14

Neil v. Biggers,
409 U.S. 188 (1972) 14

Perry v. State of New Hampshire,
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STATUTES

U.S. Const. amend XIV 2

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITY

Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsey et al., eds., 2007). 13

Cited Authorities

Page

Elliott Blackburn, *State's first posthumous pardon releases hurt, anger for Cole family*, LUBBOCK AVALANCHE-JOURNAL, Mar. 20, 2010 ..... 29, 30

Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsey et al., eds., 2007) 11, 12

Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002) .. 10, 11

John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983) 5, 13

Rick Casey, *A tale of twin traumas*, HOUSTON CHRON, Aug. 5, 2009 ..... 28, 29, 30

Rick Casey, *What's the matter with Texas DAs?: No sign lesson learned*, HOUSTON CHRON., Aug. 7, 2009 ..... 29, 30

Kenneth A. Deffenbacher, *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 139 (2008) ... 6

Cited Authorities

Page

Fred Dickey, *Worst Case Scenario*, L.A. TIMES MAG., Jun. 25, 2000 ..... 21, 22, 23, 24

Susan Dixon & Amina Memon, *The Effect of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, 19 APPLIED COGNITIVE PSYCHOL. 935 (2005) 10, 11

Amy Bradfield Douglass & Dawn McQuiston-Surrett, *Post-Identification Feedback: Exploring the Effects of Sequential Photospreads and Eyewitnesses' Awareness of the Identification Task*, 20 APPLIED COGNITIVE PSYCHOL. 991 (2006) 12

Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006) 10

Editorial, *An innocent man, 12 years in prison*, SAN JOSE MERCURY NEWS, March 10, 2000..... 23

Brandon Formby, *Years later, state clears wrongfully convicted man*, DALLAS MORNING NEWS, Mar. 20, 2010 30

Fiona Gabbert *et al.*, *Say it to my face: Examining the effects of socially encountered misinformation*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 215 (2004)..... 7, 8

Cited Authorities

Page

Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) 2

Lorraine Hope et al., *"With a little help from my friends . . ." The role of co-witness relationship in susceptibility to information*, 127 ACTA PSYCHOLOGICA 476 (2008) 8

Innocence Project, *Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php 2

Leonora LaPeter, *Guilty until proven innocent*, ST. PETERSBURG TIMES, Nov. 14, 2004 ..... *passim*

Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194 (2009) 8

D. Stephen Lindsay, *Misleading Suggestions Can Impair Eyewitness' Ability to Remember Event Details*, 16 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, AND COGNITION 1077 (1990) 7, 8

R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79 (1981) ... 12

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R.C.L. Lindsay et al., ***How Variations in Distance Affect Eyewitness Reports and Identification Accuracy***, 32 LAW & HUM. BEHAV. 526 (2008) ... 6

Elizabeth F. Loftus et al., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 12-13 (4th ed. 2007) 6, 7, 13

Elizabeth F. Loftus et al., ***Semantic Integration of Verbal Information into a Visual Memory***, 4 EXPERIMENTAL PSYCHOL.: HUM. LEARNING & BEHAV. 19 (1978) 6

ELIZABETH F. LOFTUS & EDITH GREENE, ***Warning: Even Memory for Faces May be Contagious***, 4 LAW & HUM. BEHAV. 323 (1980) 6

Elizabeth F. Loftus & Jacqueline E. Pickerell, ***The Formation of False Memories***, 25 PSYCHIATRIC ANNALS 720 (1995) 7

C.A. Elizabeth Luus & Gary L. Wells, ***The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects***, 79 J. APPLIED PSYCHOL. 714 (1994) 11

Armen H. Merjian, ***Anatomy of a Wrongful Conviction:*** State v. Dedge ***and What it Tells Us About Our Flawed Criminal Justice System***, 13 U. PA. J. L. & SOC. CHANGE 137 (2009-10) 18, 19, 20

Cited Authorities

Page

Nat'l Inst. of Justice, U.S. Dep't of Justice, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 2 (1999) 7

David F. Ross et al., *Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 J. APPLIED PSYCHOL. 918 (1994) 8-9

Bob Ray Sanders, *Innocence lost in attack, but courage was found*, FORT WORTH STAR-TELEGRAM, Jan. 23, 2011 ..... 28, 30

Daniel L. Schacter, THE SEVEN SINS OF MEMORY 112-137 (2001) 7

Laurin Sellers, *DNA testing frees man accused in 1981 rape*, ORLANDO SENTINEL, Aug. 12, 2004 ... 21

PBS Frontline: What Jennifer Saw, <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html> 25, 26, 28

Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986) 7

Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 APPLIED COGNITIVE PSYCHOL. 489 (2007) ..... *passim*

Page

John L. Smith, *Adjusting takes time for falsely accused ex-con after 22 years in prison*, LAS VEGAS REV. J., Sep. 5, 2004 19

Texan Who Died In Prison Cleared of Rape Conviction, CNN JUSTICE, Feb. 6, 2009, <http://www.cnn.com/2009/CRIME/02/06/texas.exoneration/index.html?iref=allsearch> 30

Jennifer Thompson, *I Was Certain, But I Was Wrong*, N. Y. TIMES, Jun. 18, 2000 ..... 25, 26, 27, 28

James Thorner, *Ron Cotton: Freedom: Tenacity Paid Off: Innocent Man Carries Scars from His Decade in Prison*, GREENSBORO NEWS & RECORD (N.C.), July 10, 1995 ..... 27, 28

Samantha Weinberg, *Trials and Errors*, THE OBSERVER, May 4, 2003 ..... 22, 23, 24

Gary L. Wells et al., *Accuracy, Confidence, and Juror Perception in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979) 12

Gary L. Wells, et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45 (2006) 12

Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006) 7

Cited Authorities

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Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998) 7, 10

Daniel B. Wright et al., *Memory conformity: Exploring misinformation effects when presented by another person*, 91 BRIT. J. PSYCHOL. 189 (2000) 8

Luisa Yanez, *Wrongful conviction: DNA test frees man after 22 years*, MIAMI HERALD, Aug. 13, 2004 21

INTEREST OF *AMICI CURIAE*

Amici are exonerees who were wrongfully convicted and imprisoned for several years as a result of mistaken eyewitness identifications, and crime victims whose sincere but mistaken identifications helped convict and imprison innocent persons.[1] The Court's ruling in this case will determine whether defendants and crime victims may be denied procedural protections against future wrongful convictions based on unreliable and mistaken eyewitness identifications. Accordingly, *amici* submit this brief to illustrate that suggestive circumstances, regardless of whether they are the result of improper state action, can create a substantial risk of misidentification that will irreparably compromise a defendant's right to a fair trial, and inevitably result in the wrongful conviction of innocent persons.

PRELIMINARY STATEMENT

The purpose of a criminal trial is to determine the truth regarding culpability, not only to assess whether the accused is guilty and deserving of punishment, but also to render justice for the victim and prevent the future occurrence of crime. Reliable evidence is the foundation of a fair trial and its determination of truth; it is essential for the service of these purposes of retribution, justice and

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1. Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel has made a monetary contribution intented to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent to the filing of this brief from both parties have been filed with the Clerk.

prevention. Courts have a responsibility to the victim, the accused, and the public to ensure that evidence admitted at trial is sufficiently reliable, and properly of use to the jury that will make the final determination of truth.

Eyewitness misidentification is the single greatest cause of wrongful convictions in the United States, playing a role in more than 75% of convictions overturned by DNA testing.[2] This Court has long recognized the vagaries and vulnerabilities of eyewitness evidence, and the threats that identifications involving suggestive circumstances pose to the fairness of criminal trials. Indeed, this Court has held that the Due Process Clause of the Fourteenth Amendment requires trial courts to ensure the reliability of eyewitness identifications when they involve suggestive circumstances. However, the New Hampshire Supreme Court and other courts limit this protection to identifications involving suggestive circumstances intentionally orchestrated by state actors. By doing so, they misunderstand the due process interest underlying this Court's holding – the right not to be tried on the basis of an unreliable identification that carries a substantial risk of being mistaken. They also ignore other sources of suggestion that are just as likely to undermine the reliability of an identification, and an untold number of misidentifications that have resulted, and will result, in a wrongful conviction.

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2. Innocence Project, *Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php. *See also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011) (finding that 190 of the first 250 DNA-based exonerations in the United States involved eyewitness misidentification).

Amici urge this Court to make clear that due process protection against unreliable eyewitness evidence extends to *all* identifications made under suggestive circumstances, not just those involving improper state action. Three decades of robust scientific research has abundantly demonstrated what this Court has long suspected, and what *amici* know all too well: suggestive circumstances, whatever their source, can produce unreliable eyewitness identifications that pose serious and unique threats to the fairness and integrity of a criminal trial, and cause a substantial likelihood of misidentification and wrongful conviction. *Amici* Wilton Dedge and Herman Atkins were convicted on the strength of misidentifications suggested by circumstances having nothing to do with police or prosecutorial misconduct. *Amici* Jennifer Thompson and Michele Mallin can attest that suggestive circumstances can cause even conscientious eyewitnesses exposed to sustained contact with a perpetrator to make a mistaken identification. As all of their cases[3] illustrate, whether suggestive circumstances are orchestrated by the police or entirely unrelated to intentional state action, their potential effect is the same: the eyewitness takes the stand and, with conviction and confidence, even under cross-examination, provides the jury persuasive and often dispositive direct evidence implicating the accused that is patently unreliable – and frequently tragically wrong.

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3. The facts of the crimes and mistaken identifications in the cases involving *amici* are taken from media reports, citations to which have been provided.

SUMMARY OF ARGUMENT

In criminal trials, eyewitness evidence – particularly when it comes from the victim – is often the most compelling and weighty evidence that a jury will consider. Yet, as recent scientific research has confirmed, this evidence is often fraught with unique reliability concerns that juries can not properly assess, because they do not fully comprehend the nature of memory and its susceptibility to contamination. This contamination results from external circumstances that suggest to the eyewitness something about the perpetrator or event that she did not actually observe, and thus unknowingly alter and define her memory of her observation.

Thus, it is up to the trial court, in its role as evidentiary gatekeeper, to assess the reliability of eyewitness identifications involving suggestive circumstances before they are admitted, regardless of their source. Indeed, this Court has already held that due process mandates such an assessment. When courts limit their pre-trial assessments of suggestiveness to circumstances involving improper state action, they ignore identifications that are similarly tainted, and just as unreliable. By undergoing the same assessments with identifications involving non-state suggestive circumstances, and by employing a number of available remedies when a substantial risk of misidentification is found, courts can ensure the defendant's right to a fair trial, and prevent future wrongful convictions.

Amici are living proof that identifications involving suggestive circumstances, regardless of their source, can lead to disastrous consequences. Their lives have

been seriously and irreversibly changed by mistaken identifications, by years lost in prisons for heinous crimes they did not commit, or by the unremitting guilt and denial of justice that comes with helping send the wrong man to prison for crimes committed against them. Their stories illustrate the need for courts to ensure the reliability of eyewitness evidence involving suggestive circumstances as they would any other evidence bearing the indicia of unreliability, in order to prevent sincere but mistaken identifications from leading juries astray in their determination of the truth.

ARGUMENT

I. Suggestive Circumstances, Whatever Their Source, Undermine The Reliability of Eyewitness Evidence

During the past three decades, researchers have demonstrated that our memory does not, as jurors tend to believe,[4] function like a videotape, capable of thoroughly recording and faithfully replaying an observation at any time, but is instead a constructive, dynamic, and corruptible process. This process is comprised of three successive phases: "encoding" or "acquisition," which occurs when the witness perceives the event; "storage," which is the eyewitness's retention of the acquired information from the occurrence of the event through her attempt to recall it; and "retrieval," which is the process through which the witness attempts to recall

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4. *See, e.g.*, John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983).

and reconstruct the event.[5] During the first phase, the eyewitness constructs a memory based on only limited bits of information regarding the event, due to the effects of several event-related or "estimator" variables, including eyewitness stress level, the duration of the event, lighting conditions, and others.[6] Subsequently, while the memory of the event is being stored, it can become unknowingly commingled with post-event information processed by the eyewitness.[7] This memory may then be further impaired or distorted by a variety of factors during the process of retrieval.[8] Throughout all of this, the memory is subject to rapid and continuous decay.[9]

Because the accuracy and reliability of memory is subject to so many external influences, researchers

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5. ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 12-13 (4th ed. 2007); Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 APPLIED COGNITIVE PSYCHOL. 489, 489 (2007).

6. *See* LOFTUS ET AL., *supra* note 5, at 12-50; *see also, e.g.*, R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 LAW & HUM. BEHAV. 526 (2008) (discussing effects of distance).

7. *See* LOFTUS ET AL., *supra* note 5, at 58-63; *see also, e.g.*, Elizabeth F. Loftus et al., *Semantic Integration of Verbal Information into a Visual Memory*, 4 EXPERIMENTAL PSYCHOL.: HUM. LEARNING & BEHAV. 19 (1978).

8. *See* LOFTUS ET AL., *supra* note 5, at 70-72; *see also, e.g.*, ELIZABETH F. LOFTUS & EDITH GREENE, *Warning: Even Memory for Faces May be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980).

9. *See, e.g.*, Kenneth A. Deffenbacher, *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 139 (2008).

commonly urge that eyewitness identifications should properly be regarded as trace evidence, subject to degradation and contamination from external sources, like a bloodstain or fingerprint at a crime scene.[10] For an eyewitness, this contamination is caused by external circumstances involving information that somehow suggests to the eyewitness something about the characteristics of the perpetrator or event that she did not actually observe, and thus alters and defines her memory of her observation. Indeed, an extensive body of research demonstrates that the memories of eyewitnesses regarding events and faces are highly malleable, and can easily be altered by information received after they have observed the event in question.[11]

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10. *See, e.g.*, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 2 (1999); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 622-23 (2006); LOFTUS ET AL., *supra* note 5, at 173.

11. *See generally, e.g.*, Elizabeth F. Loftus & Jacqueline E. Pickerell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720 (1995); D. Stephen Lindsay, *Misleading Suggestions Can Impair Eyewitness' Ability to Remember Event Details*, 16 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, AND COGNITION 1077 (1990); Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986); Fiona Gabbert et al., *Say it to my face: Examining the effects of socially encountered misinformation*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 215 (2004); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998); DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY 112-137 (2001); LOFTUS ET AL., *supra* note 5, at 58-69; Skagerberg, *supra* note 5, at 489.

Just as with physical trace evidence, contamination undermines the reliability of memory regardless of its source. While suggestive circumstances do sometimes result from law enforcement procedures, such as manipulated line-ups and photo arrays or leading statements during eyewitness interviews, they often have nothing to do with intentional police misconduct. For example, if an officer simply forgets to instruct an eyewitness that a lineup does not necessarily contain a suspect, this may suggest to the eyewitness that the suspect is present, and cause her to feel compelled to make an identification, whether or not she recognizes any of the candidates.[12] Similarly, studies have shown that circumstances contributing to suggestibility can result from other sources, including conversations with co-witnesses, exposure to narratives or descriptions of the witnessed event rendered by others, or mere circumstance.[13] As the stories of *amici* exonerees

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12. *See, e.g.*, Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications : Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194, 196 (2009).

13. *See generally, e.g.*, Fiona Gabbert et al., *supra* note 11 (studying effects of misinformation conveyed in discussions between co-witnesses to an event); Daniel B. Wright et al., *Memory conformity: Exploring misinformation effects when presented by another person*, 91 BRIT. J. PSYCHOL. 189 (2000) (same); Lorraine Hope et al., *"With a little help from my friends . . ." The role of co-witness relationship in susceptibility to information*, 127 ACTA PSYCHOLOGICA 476 (2008) (same for acquainted co-witnesses, such as family or friends); D. Stephen Lindsay, *supra* note 11 (studying effects of misinformation conveyed in post-event narratives of an event); David F. Ross et al., *Unconscious Transference and*

demonstrate, non-state suggestive circumstances can be just as harmful as those resulting from intentional police conduct.

This case provides a clear example of how suggestive circumstances that are not orchestrated by state actors can create a substantial risk of misidentification. Shortly after observing someone removing items from her neighbor's car from her apartment window and calling the police, eyewitness Nubia Blandon happened to see Barion Perry standing in that same parking lot with a police officer. Petition for Writ of Certiorari at 5-7, *Perry v. State of New Hampshire*, No. 08-8974 (U.S. Feb. 11, 2011). Before this sighting, Ms. Blandon could only describe the perpetrator as a tall African-American man. *Id.* at 3. She could not describe the perpetrator's facial features, clothing, or other physical characteristics. *Id.* Ms. Blandon later stated that she "did not clearly perceive the details of his face," as she was "so scared" that she "didn't really pay attention" to these details while observing the event. *Id.* at 7-8. Indeed, Ms. Blandon was later unable to pick Mr. Perry's photograph out of a lineup and did not identify him in court. *Id.* at 8. However, upon seeing Mr. Perry standing in the parking lot with a uniformed police officer, shortly after witnessing what she understood to be a break-in, Ms. Blandon identified him to another police officer as the perpetrator. *Id.* at 7. Notably, at the moment Ms. Blandon observed Mr. Perry, he was the only civilian in the parking lot, and the only African-American. *Id.* at 3.

Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. APPLIED PSYCHOL. 918 (1994) (analyzing widely recognized phenomenon in which an eyewitness misconceives a familiar person from another context as the perpetrator of the witnessed crime).

Based on the totality of the circumstances, this scenario, though not intentionally staged by the police, created a significant suggestion that Mr. Perry was the perpetrator. Ms. Blandon identified Mr. Perry based on post-event information with suggestive characteristics – specifically, the presence of a police officer, standing with a man sharing the same broad physical characteristics actually observed by Ms. Blandon in the perpetrator, in the general vicinity of the witnessed crime, only minutes after that crime took place and police were called onto the scene.

II. The Admission Of Evidence Made Unreliable By Suggestive Circumstances Creates A Substantial Risk of Misidentification And Wrongful Conviction

Suggestive circumstances undermine the reliability not only of an eyewitness's memory, but of her confidence in that memory as well. Studies have consistently shown that suggestion can inflate a eyewitness's confidence in the accuracy of a mistaken identification, by imparting post-event information or social cues that tend to support or confirm that identification.[14] This inflation of confidence

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14. *See, e.g.*, Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 115 (2002); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864-65 (2006); Susan Dixon & Amina Memon, *The Effect of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, 19 APPLIED COGNITIVE PSYCHOL. 935, 946-47 (2005); Gary L. Wells & Amy L. Bradfield, *supra* note 11, at 361; Skagerberg, *supra* note 5, at 491.

often also extends to the eyewitness's retrospective reports of her observation experience, causing her to exaggerate the quality of the "estimator" variables that affected her ability to observe the perpetrator and the crime – and that factor into assessments of her identification's reliability.[15]

Just as with memory, suggestion contaminates and distorts eyewitness confidence regardless of its source. Although confidence-inflating suggestion is sometimes imparted by state actors, such as lineup administrators who inform an eyewitness that she has identified the police's prime suspect, it can and does also come from sources unrelated to police misconduct, such as co-witnesses or reports or other descriptions of the witnessed event.[16]

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15. *See, e.g.*, Dixon & Memon, *supra* note 14, at 937 (finding witnesses receiving confirming post-identification feedback "reported a better view of the culprit, increased attention to the event, a stronger basis for making an identification, less time to make an identification, increased ease of identification, and increased willingness to testify."); *see also* Skagerberg, *supra* note 5, at 491 ("Positive feedback inflated certainty, willingness to testify in court as well as scores on the other testimony-relevant questions based on the [*Neil v.*] *Biggers* criteria (i.e. . . . certainty, attention, view, time and the pre-identification description)" (citation omitted); Bradfield et al., *supra* note 14, at 118 (confirming feedback "inflated witnesses' recollections of their ability to make out details of the culprit's face," as well as ease of identification and willingness to testify).

16. *See, e.g.*, C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychol. 714, 714 (1994); Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 The Handbook of Eyewitness Psychology: Memory for People 501, 507 (R.C.L. Lindsey et al., eds., 2007); Skagerberg, *supra* note 5, at 491.

Unfortunately, the inflation of confidence in mistaken identifications caused by suggestive circumstances becomes highly problematic at trial, as jurors tend to rely heavily on an eyewitness's confidence when assessing the dependability of their identification.[17] This reliance persists even when juries are presented with evidence of suggestion, probably because laypersons do not understand its disruptive influence on the relationship between confidence and accuracy.[18] The eyewitness herself does not understand this influence; as the *amici* crime victims can attest, an eyewitness making a mistaken identification due to suggestion is not lying but honestly reporting, with confidence and conviction, on what she believes she saw.

As a result of this overemphasis on eyewitness confidence, as well as a fundamental insensitivity to more dependable indicators of eyewitness accuracy such as cross-race identification, lighting conditions, and weapon focus, juries are unable to make the same credibility and weight determinations with mistaken eyewitnesses that

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17. *See, e.g.*, Gary L. Wells, et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45, 65 (2006); *see also* Gary L. Wells et al., *Accuracy, Confidence, and Juror Perception in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 446 (1979); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 86-87 (1981); Boyce et al., *supra* note 16, at 507.

18. *See* Amy Bradfield Douglass & Dawn McQuiston-Surrett, *Post-Identification Feedback: Exploring the Effects of Sequential Photospreads and Eyewitnesses' Awareness of the Identification Task*, 20 APPLIED COGNITIVE PSYCHOL. 991, 992 (2006).

they make with other witnesses.[19] Thus, cross-examination at trial has been recognized as having limited utility for addressing potential reliability concerns inherent in an eyewitness identification.[20]

III. Courts Must Ensure the Reliability of Eyewitness Identifications Involving Suggestive Circumstances, Regardless of Source, Before They Are Admitted

Because juries have such great difficulties dealing with the reliability problems inherent in identifications involving suggestive circumstances, it is up to the trial court, in its role as evidentiary gatekeeper, to assess the reliability of these identifications before they are admitted. Indeed, this Court has recognized that such assessments are required to achieve "fairness as required by the Due Process Clause of the Fourteenth Amendment." *See Manson v. Brathwaite*, 432 U.S. 98, 113-114 (1977). But when courts limit pre-trial assessments of suggestiveness to instances involving intentional state action, they ignore eyewitness identifications that can be just as unreliable, resulting from circumstances that can be just as contaminating for an eyewitness's memory. As illustrated above, and as the stories of *amici* exonerees demonstrate below, non-state suggestive circumstances can produce unreliable eyewitness identifications that pose

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19. *See generally* LOFTUS et al., *supra* note 5, at 123-33; Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE, *supra* note 16, at 475-85; Brigham & Bothwell, *supra* note 4, at 19-29.

20. *See, e.g.*, Benton et al., *supra* note 19, at 489-90.

serious and unique threats to the fairness and integrity of a criminal trial.

As an initial matter, courts should examine and weigh the corrupting effect of suggestive circumstances, whatever their source, against the totality of factors involved in an identification, as this Court has instructed. *See Manson*, 32 U.S. at 114; *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). These factors include, but should not be limited to, ones previously identified by this Court, such as an eyewitness's opportunity to view the perpetrator during the crime, her degree of attention, the accuracy of her prior description of the perpetrator, and the level of certainty she demonstrated when first confronted with the accused in a photograph or in person. *Manson*, 32 U.S. at 114; *Neil v. Biggers*, 409 U.S. at 199-200. As discussed above, it is important that courts examine objective measures of these factors when possible, due to the distorting influence of suggestion on an eyewitness's own retrospective reports of these factors. Although none of these factors alone guarantees or condemns the reliability of an identification, as scientific research has shown and the *amici* crime victims can attest, when examined together, they can help the court determine whether the identification sought to be offered at trial is sufficiently reliable based on the observation underlying it, or whether the suggestion at issue created a substantial risk of misidentification.

If a substantial risk of misidentification is found, the court can employ a number of remedies to fix the reliability problem. Certainly, if the identification is altogether unreliable, it should be excluded entirely. *See Manson*, 432 U.S. at 112 (noting Court's concern "that the jury not hear

eyewitness testimony unless that evidence has aspects of reliability"). But remedies short of exclusion are also available. For example, courts can instruct juries to place greater, if not exclusive, weight on "primary" identification evidence, when it exists – namely, the eyewitness's *initial* description of the perpetrator, event, and event-related factors such as her opportunity to review and her level of certainty. This measure can minimize the contaminating effect of suggestive circumstances on an eyewitness's memory and confidence that occur subsequent to the "primary" identification. Along these same lines, the court can suppress any part of an identification that carries a substantial risk of contamination. Additionally, if a certainty statement was taken from the eyewitness when she made an initial out-of-court identification, the court should preclude the witness from testifying to her level of certainty at trial, thus preventing typical juror over-reliance on this factor. Courts can also provide guidance to jurors regarding the vagaries of eyewitness identification and memory in jury instructions, based on recent scientific research, or through expert testimony tailored to the facts at issue. In these ways, courts may alleviate the reliability concerns that can severely compromise the accused's right to a fair trial, and the jury's determination of the truth regarding culpability.

In this case, these practices would have enabled the trial court to admit the only direct eyewitness evidence of the crime at issue without jeopardizing Mr. Perry's right to a fair trial. If it had conducted a pre-trial assessment of the totality of circumstances involved in Ms. Blandon's identification of Mr. Perry, including the lighting in the parking lot, the distance from Ms. Blandon's window to the witnessed crime, and most critically, Ms. Blandon's

admission that that she was too frightened to pay full attention to many of the perpetrator's face or other physical details while observing the event, as well as her inability to identify Mr. Perry from a photo array after identifying him in the parking lot following the crime, and weighed these factors against the suggestive circumstances under which she first encountered Mr. Perry, described above, the court would likely have found that these circumstances created a substantial risk of misidentification. In order to address this risk, the court likely would have suppressed Ms. Blandon's identification of Perry, or perhaps instructed the jury to treat it with caution, in favor of her "primary" identification, given before the suggestive circumstances arose: that she saw a tall African-American male removing items from a car, but did not see his face, clothing, or facial hair. This identification more faithfully captures Ms. Blandon's report of the actual crime, by eliminating the contaminating effect of the suggestive post-event information that she had processed, and provided the jury with more reliable evidence of the crime for which Perry was standing trial.

As the circumstances surrounding Ms. Blandon's identification of Mr. Perry demonstrate, suggestive circumstances that are not the result of intentional state action can have the same effect on the reliability of an eyewitness identification, and on the fairness and integrity of a criminal trial. Without similar judicial protections, the effects of such identifications can be devastating, as the stories of *amici* show.

IV. The Experiences of *Amici* Demonstrate The Threats Posed By Identifications Involving Suggestive Circumstances To Fair Trials and Their Determination of Truth

As *amici* Jennifer Thompson and Michele Mallin remain painfully aware, suggestive circumstances can distort an eyewitness's memory and produce a mistaken identification, no matter how scarring and sustained an event may be, and regardless of how hard they try to remember a perpetrator correctly. And as *amici* Wilton Dedge and Herman Atkins can never forget, these suggestive circumstances often have nothing to do with intentional state action. Their cases demonstrate the urgent need for this Court to reiterate that due process requires trial courts to assess the reliability of *all* identifications involving suggestive circumstances.

Wilton Dedge

On the morning of December 8, 1981, a 17-year-old cosmetology student known as "Trish" was attacked in her Canaveral Groves, Florida home by a man with a boxcutter. Leonora LaPeter, *Guilty until proven innocent*, ST. PETERSBURG TIMES, Nov. 14, 2004, at 16A. The man sliced off her clothes, cut her, and threw her onto her bed. *Id.* After slicing Trish repeatedly all over her body, he held the boxcutter to her neck, looked her in the eye, and raped her. *Id.* The man then emptied Trish's purse, went through her wallet, and raped her a second time. *Id.* After punching her twice, the attacker left. *Id.* The ordeal lasted 45 minutes, and by the end, the man had slashed Trish 65 times, across her face, neck, stomach, chest, arms, and legs. *Id.*

Shortly after the attack, Trish told police her assailant stood between six feet and six feet two inches tall, and weighed between 160 and 200 pounds. *Dedge v. State*, 442 So.2d 429, 430 (Fla. Ct. App. 1983). She described him as a muscular man, who "looked like a construction worker" with "big arms" that could easily throw her around and pin her down. Armen H. Merjian, *Anatomy of a Wrongful Conviction:* State v. Dedge *and What it Tells Us About Our Flawed Criminal Justice System*, 13 U. PA. J. L. & SOC. CHANGE 137, 143 (2009-10). She said that he had hazel eyes and a receding hairline. *Id.*

On December 12, just four days after the attack, Trish and her sister drove to their nearby hometown and pulled up to a convenience store. LaPeter, *supra*, at 16A. Trish went inside to buy her sister cigarettes and a Coke, and promptly felt a man staring at her. *Id.* That stare made her feel uneasy, and after she turned and saw a man standing nearby, Trish ran out of the store to her car. *See id.* Though she immediately noticed that the man inside looked shorter than her attacker, and had a darker mustache, she still felt shaken, recalling her ordeal. *Id.* Crying, she told her sister that the man she saw inside "looked like" the man who raped her. *Id.* As the man exited the store, Trish's sister told her that she recognized him, from her elementary school days, as Walter Dedge. *Id.* Trish refused to call the police at that time, but after seeing the man again in the same store the following week, she did so. *Id.* By that time, Trish had become certain that the man who had stared at her in the convenience store was her attacker. *Id.*

On January 8, 1982, based on Trish's sister's recognition, the police arrested Walter Dedge. *Id.* Two

days later, police showed Trish's sister a photo lineup that included Walter's picture. *Id.* Trish's sister identified Walter Dedge, but then said that the man her sister identified in the convenience store was not in fact Walter, but his brother, Wilton. *Id.* The following day, police arrested Wilton, and showed Trish a new photo lineup including Wilton's photo. *Id.* On January 11, 1982, over a month after the rape, Trish identified 20-year-old Wilton Dedge, the man she felt staring at her in the convenience store, as her attacker. *Id.*

"When I found out they were looking for me, I turned myself in," said Wilton later. John L. Smith, *Adjusting takes time for falsely accused ex-con after 22 years in prison*, LAS VEGAS REV. J., Sep. 5, 2004, at B1. "I wanted to get it straightened out. I believe if the police department had really stood back and looked, they'd know this wasn't right." *Id.* On the day of the attack, Wilton had been 46 miles away, working at a garage in Smyrna Beach, and had several alibi witnesses to attest to his whereabouts. LaPeter, *supra*, at 1A. In stark contrast to the initial description Trish gave the police, Wilton stood only five feet five inches tall, and weighed just 125 pounds. *Dedge v. State*, 442 So.2d at 430. He had blue eyes, a slight build, and a full head of hair, unlike the described assailant. Merjian, *supra*, at 143. Nevertheless, on the basis of Trish's identification, Wilton Dedge was arrested and prosecuted.

During trial, in September of 1982, Wilton took the stand and proclaimed his innocence. *Id.* at 144. No less than six witnesses swore that Wilton was in Smyrna Beach on the day of the attack; four of them testified that they were certain Dedge was at the garage until closing time.

Id. The prosecution offered three pieces of evidence to implicate Dedge as Trish's attacker: a pubic hair found on Trish's bed, a canine scent lineup and identification, and Trish's testimony. *Dedge v. State*, 442 So.2d at 430; LaPeter, *supra*, at 16A. The analyst who initially examined the pubic hair stated in his report that it had similarities and differences to the sample given by Dedge, but that "the differences were not sufficient to entirely eliminate Dedge as a possible source." LaPeter, *supra*, at 16A. The canine scent lineup was conducted three months after the crime, using a scent sample taken eight days earlier from Dedge, on a paper towel handled by others and left in a paper bag. *Id.* The jury deliberated for four hours and found Wilton guilty of the assault. *Id.* After he read the verdict, the judge stated that he was told the jury had based it on Trish's identification. *Id.* The judge sentenced Wilton to 30 years in prison. *Id.*

After 18 long months in Sumter Correctional Institute, the District Court of Appeal granted Wilton a retrial, based on the trial court's improper exclusion of the defense's own scent identification expert. *Dedge v. State*, 442 So.2d at 430-31. During retrial, defense counsel exposed major flaws in the canine scent identification, and again challenged the hair evidence, emphasizing that the prosecution's experts could not definitively state that it was Wilton's. Merjian, *supra*, at 144-48. The prosecution presented the hair, the testimony of a jailhouse informant (who was serving a 180-year sentence for three murder-for-hire plots) claiming that Wilton confessed the crime to him in suspiciously precise detail – and Trish's identification. *Id.* Wilton again took the stand in his own defense, to no avail. *Id.* at 148. In August 1984, Wilton was convicted again for raping Trish, and this time, the judge gave him a life sentence. LaPeter, supra, at 16A.

By the time advanced DNA testing finally exonerated Wilton in 2004, he had spent 22 years in prison – more than half his life. Two of those years were spent in solitary confinement, which he requested after fearing for his life in general population. *Id.* at 17A. "I never got to have kids. I never got to get married. Now I've got to start, and I've got nothing," he said shortly after his release. Luisa Yanez, *Wrongful conviction: DNA test frees man after 22 years*, MIAMI HERALD, Aug. 13, 2004, at 3B. "I'm very, very disappointed. There's anger there. But I can't dwell on anger or I'll mess up my life." LaPeter, *supra*, at 17A.

As Wilton tries to move forward, Trish has to look back, at her horrific ordeal and her two in-court identifications of Wilton as her attacker. The Brevard County State Attorney at the time of Wilton's release said that Trish was "devastated" by the news that she had sent the wrong man to prison. Laurin Sellers, *DNA testing frees man accused in 1981 rape*, ORLANDO SENTINEL, Aug. 12, 2004, at A12. He also said that police had no prospects for finding and bringing to justice the man who actually brutalized Trish that December day 22 years ago. *See id.*

Herman Atkins

A 23-year-old woman was working at a Lake Elsinore, California shoe store on April 8, 1996, when a young, slim African-American man walked in and asked to try on a pair of shoes. Fred Dickey, *Worst Case Scenario*, L.A. TIMES MAG., Jun. 25, 2000, at 19. He was the only customer in the store, and took his time examining the merchandise. *Id.* When the woman returned from the stock room, the man held a gun to her neck, dragged her back into the stock room, raped her repeatedly, and forced

her to perform oral sex. Samantha Weinberg, *Trials and Errors*, THE OBSERVER, May 4, 2003, at 22. As he fled, he told the woman that he would kill her if she followed. *Id.*

The woman called the police, and after undergoing a medical exam, she went into an interview room with her mother to look through photographs in recent yearbooks from local high schools for her attacker. Dickey, *supra*, at 19. She did not recognize anyone from the yearbooks. *Id.* However, while waiting for a detective to return with more photographs, the woman spotted a "Wanted" poster that happened to be lying on a nearby table in the interview room. *Id.* The man on the "Wanted" poster was a young, slim, African-American man, just like the one who attacked her – though this one was from Los Angeles, and was nowhere to be found in the yearbooks the detective asked her to look through. *See id.* Nevertheless, after the detective returned to the interview room, according to his account, the woman told him, "I think this is him. If it's not him, it's someone who looks just like him." *Id.* When recounting that moment on the witness stand at Herman's trial, however, the woman sounded much more definitive; she testified that she turned to her mother, pointed at the poster, and said "That's him." *Id.*

The face on the poster belonged to Herman Atkins, a 20-year-old man from Los Angeles. *Id.* Herman was wanted by the Los Angeles police in connection with a January 26, 1986 incident, in which gunshots were fired that allegedly wounded two police officers. *Id.* Herman claimed says he was just trying to foil a robbery that day; police believed it was a drug deal gone wrong. Weinberg, *supra*, at 22. Herman became scared and fled first to Texas, and then to Arizona, where he was arrested by

Phoenix police 10 months later. *Id.*; Dickey, *supra*, at 19. Herman was then extradited back to California, after the Phoenix police discovered that there was an outstanding warrant for his arrest on nine counts of attempted murder in Los Angeles – and one on charges of multiple rape and robbery in Lake Elsinore. Weinberg, at 22.

Herman agreed to accept a plea for an eight-year sentence to assault with a deadly weapon for the shooting incident, after a preliminary hearing revealed that the attempted murder charges were not appropriate. *Id.* "I was shooting at a guy who was robbing my friend and me. I was a stupid kid who got scared and ran. I deserved to be punished." Dickey, at 18. But the rape and robbery charge was another issue. "I'm thinking, it's a mistake," was Herman's reaction to the charge. Weinberg, *supra*, at 22. Herman was from inner-city Los Angeles, and had never even heard of the small town of Lake Elsinore. Dickey, *supra*, at 18. "We just assumed it was a case of mistaken identity or whatever, and it would clear itself up." Weinberg, *supra*, at 22.

However, the charge did not go away. Herman was prosecuted for the rape and robbery, and the victim took the stand to identify him and testify to details regarding the vicious assault. *See id.* at 23-24. A state serologist testified that the blood markers in the body fluids found on the vaginal swab and the victim's sweater revealed the same blood type as both Herman and the victim, and that Herman could not be excluded as the source. Dickey, *supra*, at 19. The serologist also said that the markers excluded 94% of the population, a claim later demonstrated to be false. Editorial, *An innocent man, 12 years in prison*, SAN JOSE MERCURY NEWS, March 10, 2000, at 6B. On the basis

of this evidence, two corroborating misidentifications, and the victim's testimony, Herman was convicted of burglary, rape, and forced oral copulation, and later sentenced to 47 years and 8 months in prison. *See* Weinberg, *supra*, at 24; Dickey at 19. "I couldn't believe that the system could make this kind of mistake," Herman thought. Weinberg, *supra*, at 24. "I couldn't believe I was going to spend the rest of my life paying for a crime I did not commit." *Id.*

At 21 years old, Herman entered the Old Folsom maximum security facility as a convicted rapist. "I gave up hope. As far as I was concerned, it was the beginning of the end of my life," he said later. *Id.* at 26. Herman endured 13 years, three months, and six days of hell, surviving three attempts on his life and constantly fearing others, witnessing murders and suicides, race riots and rapes, hangings and stabbings. *Id.* at 26; Dickey, *supra*, at 16. After finally being exonerated by DNA evidence and released on February 18, 2000, Herman was so utterly changed, and had lost so much time, that he was scared to leave. "Got no skills, no education, no friends, no way to make a living." Dickey, *supra*, at 16. What he had were memories of his years in prison, which would "walk with me until the day I die." *Id.*

Herman's life wasn't the only one affected by his wrongful conviction. "Saying I'm sorry is not enough," said the victim shortly after Herman's release. *Id.* at 34. "Nothing I can say will replace those years out of his life. I feel terrible. Absolutely terrible. Here I was, trying to get a rapist off the streets, and then I find out he could still be out there." *Id.* "I thought he was the one." *Id.*

Jennifer Thompson

Jennifer Thompson went out of her way to observe as much as she possibly could about the man who raped her at knifepoint in her Burlington, North Carolina apartment that summer night in 1984. She studied every detail on the man's face, and searched for scars, tattoos, and anything that would help her identify him later. Jennifer Thompson, *I Was Certain, But I Was Wrong*, N. Y. TIMES, Jun. 18, 2000, at 15. She used all light sources available to her in the darkness, including her blinds, her bedroom window, even her stereo display; she even lured him toward the bathroom and the kitchen, turning on the lights in each, hoping to catch another glimpse.[21] She made sure to stand near him when she got up from the bed, to assess how tall he was in relation. PBS Frontline, *supra*. She wanted to make sure that, if given the opportunity, she would be able to help put him in prison for what he did to her. Thompson, *supra*, at 15.

Thankfully, Jennifer did get that opportunity, after escaping her apartment and finding help. Hours later, after an examination was conducted and evidence was collected with a rape kit, she went to the police station to work on a composite sketch of her attacker. PBS Frontline, *supra*. She did the best she could, looking through hundreds of noses, eyes, eyebrows, and hairlines. Thompson, *supra*, at 15. She recounted her experience several times, and gave as many statements as she possibly could. PBS Frontline, *supra*.

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21. PBS Frontline: What Jennifer Saw, http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html [hereinafter PBS Frontline] (last visited Jul. 21, 2011).

The police distributed Jennifer's composite sketch, and received a tip about a young man named Ronald Cotton, who had a record that included guilty pleas to breaking and entering and sexual assault. 60 Minutes (CBS Broadcast Jul. 12, 2009) [hereinafter 60 Minutes]. The police placed a photograph of Ronald in an array with photographs of five other men for Jennifer to examine. *Id.* Jennifer was told that the array may or may not include a photo of her attacker. *Id.* Jennifer studied the photographs for five minutes, and identified Ronald's. *Id.* Ronald was arrested and placed in a physical lineup with five other men, and after narrowing the decision to two of the men, Jennifer again identified Ronald. *Id.*

"[W]hat was said to me afterwards was, 'That's the same person you picked out in the photo lineup. So, in my mind I thought, bingo. I did it right," Jennifer said. *Id.* "His mannerisms, his voice, his height, his weight – it all just added up on my mind. And as the evidence started to come in, it was almost just conclusive to me that this had been the rapist," she said. PBS Frontline, *supra*. "[M]y mind would always see Ronald Cotton. When I would have a nightmare, when I would re-live the night in my head, Ronald Cotton's head, his face was right there for me to see for years." *Id.* Jennifer became completely certain she had found the right man; she had no hesitations about sending him to the electric chair. Thompson, *supra*, at 15.

With little physical evidence tying Cotton to the scene of the crime, and a shaky alibi, Ronald was tried and convicted in January 1985, on the strength of Jennifer's testimony. Thompson later said that the day Ronald was convicted was the happiest day of her life, because she could put the whole ordeal behind her. *Id.*

However, with Ronald behind bars, the rapes continued in Burlington. A few months later, Bobby Leon Poole was arrested and charged with raping at least half a dozen women in the area. James Thorner, *Ron Cotton: Freedom: Tenacity Paid Off: Innocent Man Carries Scars from His Decade in Prison*, GREENSBORO NEWS & RECORD (N.C.), July 10, 1995, at A2. Poole pleaded guilty to some of the charges, and was given a life sentence. *Id.* Incredibly, Poole was assigned to the same prison wing as Ronald, and arrived there shortly after Ronald did. *Id.* Poole bragged to others in that prison wing about committing several rapes, including Jennifer's, and Ronald burned with anger and frustration – but quietly held hope that he might soon be exonerated. *See id.*

In 1987, during a retrial following an appellate court reversal of Ronald's conviction, Poole was brought into court after word surfaced of his admission to the crime. Thompson, *supra*, at 15. Poole was presented to Jennifer, who was told of his bragging and asked if he was the man who put her through that harrowing ordeal three years before. *Id.* Jennifer studied Poole and responded that she had never seen him in her entire life, and in fact had no idea who he was. *Id.* After Jennifer again identified Ronald as the perpetrator, Ronald was convicted a second time. *Id.*

In 1995, new counsel sought to have DNA testing done on the scant physical evidence left by the perpetrator at the crime scene. Thorner, *supra*, at A2. Jennifer was asked to submit a blood sample for the testing, and agreed because she "knew that Ronald Cotton had raped me and DNA was only going to confirm that." Thompson, *supra*, at 15. The DNA testing excluded Ronald Cotton for Jennifer's rape, and implicated Bobby Leon Poole. Thorner, *supra*,

at A2. After being confronted with the evidence, Poole confessed in writing to raping Jennifer that summer night in 1984. *Id.*

Jennifer was devastated. "The man I was so sure I had never seen before in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent." Thompson, *supra*, at 15. "I live with constant anguish that my profound mistake cost him so dearly. I can not imagine what would have happened had my mistaken identification occurred in a capital case." *Id.*

Jennifer also lives with the pain caused by her ordeal on that summer night in 1984, but even though she now knows the truth about the man who put her through it, her mind can not quite process it. "I still see Ronald Cotton. And I am not saying that to point a finger . . . I would do anything to erase that face out of my mind, but I can't. . . . [M]y mind now says, 'Well, it's Bobby Poole,' but his is still the face I see." PBS Frontline, *supra*.

Michele Mallin

In March 1985, a man abducted 20-year-old Texas Tech student Michele Mallin at knifepoint in a church parking lot, as she was getting into her car. Rick Casey, *A tale of twin traumas*, HOUSTON CHRON, Aug. 5, 2009, at B1 [hereinafter Casey, *Twin traumas*]. The man forced his way into Michele's car, drove her to the outskirts of town, raped her, robbed her of what little money and jewelry she had, and fled. Bob Ray Sanders, *Innocence lost in attack, but courage was found*, FORT WORTH STAR-TELEGRAM, Jan. 23, 2011, available at 2011 WLNR 1368725.

She was the fifth woman at Texas Tech to be raped, all by a perpetrator fitting the same general description: tall, African-American, short curly hair, large eyes. Elliott Blackburn, *State's first posthumous pardon releases hurt, anger for Cole family*, LUBBOCK AVALANCHE-JOURNAL, Mar. 20, 2010, available at 2010 WLNR 5852625.

Police had already been investigating the previous rapes, and had zeroed in on a 24-year-old suspect named Timothy Cole. *Id.* Cole was an Army veteran and a business student at the school. *Id.* About a month after Michele's attack, police officers came to her dorm room and showed her an array containing six photographs. Rick Casey, *What's the matter with Texas DAs?: No sign lesson learned*, HOUSTON CHRON., Aug. 7, 2009, at B1 [hereinafter Casey, *Texas DAs*]. The officers did not warn her that the suspected perpetrator might not have been among those in the array. *Id.* Five of the photographs were black-and-white mugshots of inmates staring off camera, complete with visible prisoner numbers. *See id.*; Blackburn, *supra*. The sixth was a color Polaroid of Robert Cole taken at his home, with him staring straight into the camera, surrounded by wood paneling. Blackburn, *supra*.

Mallin pointed to the Polaroid and said to officers, "I think this is him." Casey, *Texas DAs*, *supra*, at B3. A police officer asked if she was positive, and Mallin, feeling encouraged, said that she was. *Id.* The police report stated that Mallin "positively identified" Timothy Cole; it said nothing of her earlier, equivocal response. Later, in a physical lineup, she identified Cole again. Casey, *Twin traumas*, *supra*, at B7. The more Michele saw Timothy Cole, the more she became certain that he was her attacker. *Id.*

A year later, Michele identified Timothy Cole from the witness stand, at his trial. *Id.* Cole was convicted for Michele's rape, despite some notable inconsistencies, including the fact that Cole was a life-long asthmatic who didn't smoke, and the perpetrator had smoked several cigarettes during the attack. *See Casey, Texas DAs*, *supra*, at B3. After the jury rendered its verdict, Michele tearfully thanked them, and the 25-year-old Cole was sent to prison for 25 years. Blackburn, *supra*; Sanders, *supra*.

Timothy Cole served 14 of those years before dying in prison, due to heart complications brought on by his asthma. Brandon Formby, *Years later, state clears wrongfully convicted man*, DALLAS MORNING NEWS, Mar. 20, 2010, at 4B. In 2007, eight years after Cole's death, his family received a letter from Jerry Wayne Johnson, a man serving life in prison for two rapes, including that of a 15-year-old girl, confessing to Michele's rape.[22] A 2008 DNA test confirmed that Johnson was indeed the man who raped Michele. Formby, *supra*, at 4B. Michele was crushed by the revelation. "I was sad and horrified at the terrible thing that had happened. . . . I didn't intend for it to happen." Sanders, *supra*. "I was very traumatized [at the time]," she said shortly after Cole's conviction was reversed in 2010. CNN Justice, *supra*. "I tried my hardest to remember what he looked like." *Id.*

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22. *Texan Who Died In Prison Cleared of Rape Conviction*, CNN JUSTICE, Feb. 6, 2009, http://www.cnn.com/2009/CRIME/02/06/texas.exoneration/index.html?iref=allsearch (last visited 8/4/2011) [hereinafter CNN Justice].

CONCLUSION

As *amici* Jennifer Thompson and Michele Mallin can attest, eyewitness memory is subject to contamination like any other trace evidence, from suggestive circumstances that can shape and harden observations into identifications that, however sincere and sure, are profoundly unreliable. The cases of *amici* Wilton Dedge and Herman Atkins undeniably demonstrate that suggestive circumstances having nothing to do with intentional state action can be just as destructive to a fair trial and its determination of truth. As the jury verdicts in all four of their cases and untold others show, courts have a responsibility to ensure the reliability of eyewitness identifications involving any suggestive circumstances, as they would any other evidence bearing the indicia of unreliability, and the potential for such grave miscarriages of justice.

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AMICUS CURIAE BRIEF

CCORD

No. 10-8974

IN THE
Supreme Court Of The United States

BARION PERRY,

Petitioner,

v.

NEW HAMPSHIRE,

Respondent.

On Writ of Certiorari
to the Supreme Court of New Hampshire

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER, SUPPORTING REVERSAL

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Connecticut v. Ledbetter,
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Manson v. Brathwaite,
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Massachusetts v. Santoli,
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Neil v. Biggers,
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New Jersey v. Cromedy,
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Stovall v. *Denno*,
388 U.S. 293 (1967) 6

Tennessee v. Copeland,
226 S.W.3d 287 (Tenn. 2007) 17

United States v. Wade,
388 U.S. 218 (1967) 5, 6

Utah v. Long,
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Wisconsin v. DuBose,
699 N.W.2d 582 (Wis. 2005) 18

OTHER AUTHORITIES

Edwin M. Borchard, *Convicting the Innocent* (1932) 6

Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 Law & Hum. Behav. 581 (2000) 12

Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, And The Law* (1995) 12

Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) 8

Samuel R. Gross *et al.*, *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005) 8

Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 Ark. L. Rev. 231 (2000) 13

Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close Than Far Away?*, 12 *Psychonomic Bull. & Rev.* 43 (2005) 16

Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259 (1991) 13

Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & Hum. Behav. 283 (1997) 19

U.S. Dep't of Justice, Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, 24 (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf 8

Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* (1965) 6

Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 Am. Psychologist, 553 (1993) 19

Gary L. Wells & Amy L. Bradfield, *Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998) 12, 13

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Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765 (1995) 12

Cross-racial Identification and Jury Instruction, Innocence Blog (May 20, 2008 1:30pm) http://www.innocenceproject.org/Content/Crossracial_identification_and_jury_instruction.php. 18

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Know the Cases: McKinley Cromedy, http://www.innocenceproject.org/Content/McKinley_Cromedy.php (last visited Aug. 2, 2011) 18

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INTEREST OF *AMICUS CURIAE* [1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, and New Zealand.[2] The

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[1] Pursuant to Rule 37.3, a letter of consent from each party accompanies this filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware),

Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. Network members pioneered the post-conviction DNA model that has to date exonerated nearly 300 innocent persons, and they have served as counsel in most of these cases.

The vast majority of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Many of those misidentifications were made in the context of suggestive behavior by a third party -- typically by law enforcement, but often by other sources, such as family, friends, and the media. As a result, in order to minimize the risk of wrongful convictions based on eyewitness misidentifications, the Network has a compelling interest in ensuring that

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Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

the Fifth and Fourteenth Amendment Due Process Clauses guard against the use at trial of any suggestive identification that is so unreliable as to create a significant risk of misidentification.

SUMMARY OF ARGUMENT

Decades ago, this Court anticipated what the recent flood of DNA exonerations would ultimately confirm: eyewitness identifications infected by suggestion present a unique threat to the truth-finding function of the trial process. Despite the demonstrated unreliability of such identifications, lay jurors often nonetheless credit eyewitnesses who turn out to be wrong, resulting in miscarriages of justice. Responding to this unique threat, the Court imposed due process limitations on the use of such evidence, holding in a series of cases that eyewitness testimony infected by suggestion will not be admissible in criminal trials absent an independent showing of reliability.

The narrow question before the Court is whether these due process protections apply in cases where the suggestive circumstances were not intentionally orchestrated by police. Because suggestive circumstances pose the same threat to the fairness of trial regardless of who orchestrates them, the Court should answer with a resounding "yes." As this Court noted many years ago, it is not the source of the suggestive circumstance that creates the due process concern but rather "[i]t is *the likelihood of misidentification* which violates a defendant's right to due process." *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (emphasis added). "[R]eliability," the Court later reiterated in *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977), "is the linchpin in determining the *admissibility* of

identification testimony." 432 U.S. at 114 (emphasis added).

As we discuss below, the due process touchstone should remain reliability, as the constitutional concern has always been that identifications that emanate from suggestive circumstances undermine the accuracy and fairness of the *trial* process -- not whether police wrongdoing has occurred before trial. That is enough to resolve the narrow question presented. But because the Court has not addressed the issue recently, and because it will likely need to make some mention of the reliability analysis in remanding this case, *amicus* writes separately to alert the Court to an analytical problem in the lower courts that, when combined with recent advances in behavioral science research, has frequently distorted the due process reliability analysis in ways this Court never could have intended.

In its decision in *Manson*, the Court identified a set of reliability factors for courts to consider in deciding whether an eyewitness identification that was the product of suggestive circumstances should be admitted, including the witness's degree of attention, opportunity to view the perpetrator, level of certainty, and the time between the crime and the identification. *Manson*, 432 U.S. at 114. The Court expressly labeled these factors as illustrative and non-exclusive, and there is no indication the Court intended them to be applied without regard to advances in scientific research.

Nonetheless, in the past decades, many courts have mistakenly treated the reliability factors

discussed in *Manson* as if they were frozen in time. Those courts have forgotten that this Court's focus in *Manson* was on reliability, and they have ignored a host of significant scientific advances that have demonstrated flaws in some of the factors listed by *Manson* and identified other factors that could greatly aid the reliability analysis.

This Court did not intend such a result and should thus make clear that courts applying the *Manson* reliability factors must not lose sight of their fundamental purpose: to prevent the admission of an identification emanating from circumstances so suggestive as to create a substantial likelihood of a miscarriage of justice. On this point, overall reliability is the key, and courts should determine the admissibility of suggestive identifications against that standard.

ARGUMENT

I. This Court Has Long Recognized the Significant and Unique Danger that the Admission Of Unreliable Eyewitness Testimony Poses For the Criminal Justice System Generally and Criminal Trials In Particular

The Court has long recognized the significant and unique dangers that the admission of unreliable eyewitness testimony can pose for the criminal justice system. Forty-five years ago, long before the era of exculpatory DNA evidence, this Court described "the annals of criminal law" as "rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, as early as 1932, Yale law professor Edwin Borchard studied 65 wrongful conviction cases and

found that "the major source of these tragic errors is the identification of the accused by the victim." *See* Edwin M. Borchard, *Convicting the Innocent*, xiii (1932). By the time of the Court's decision in *Wade*, "[t]he vagaries of eyewitness identification" were already "well-known." *Wade*, 388 U.S. at 228.

This Court also fully understood that suggestive circumstances are the primary cause of this problem. As the Court explained in *Wade*, "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." *Id.* at 229 (quoting Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (1965)). Professor Borchard likewise found in his study that a major factor in misidentifications is "the desire . . . to support, consciously or unconsciously, an identification already made by another." Borchard, *Convicting the Innocent*, xiii (1932). So apparent to the Court was the unique prevalence and danger of suggestive identifications that, in *Stovall* v. *Denno*, 388 U.S. 293, 301-02 (1967), it held that a defendant could allege that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." In a series of subsequent cases, the Court re-affirmed that the admission at trial of suggestive identifications can potentially violate a defendant's due process rights. *See, e.g.*, *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Foster v. California*, 394 U.S. 440, 442 (1969); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Neil v. Biggers*, 409 U.S. 188 (1972); *Manson v. Braithwaite*, 432 U.S. 98 (1976).

And this Court has long been clear as to the reason suggestive identifications pose a threat to

due process. As the Court put it in *Biggers*, "[i]t is *the likelihood of misidentification* which violates a defendant's right to due process." 409 U.S. at 198 (emphasis added). "[R]eliability," the Court later reiterated in *Manson*, "is the linchpin in determining the *admissibility* of identification testimony." 432 U.S. at 114 (emphasis added). What undergirds the Court's due process concerns, in other words, is not the *act* of a suggestive identification, but rather its *consequences* -- *i.e.*, the specter of a misidentification *at trial* and its corrosive effect on the fairness of that trial. Accordingly, this Court has made clear that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *See id.* at 113 n.13. Rather, it is the subsequent *admission at trial* of such an identification that violates the Constitution. The admission of an identification in a criminal trial, of course, is state action subject to the Due Process Clause. Nowhere in any of its opinions has the Court ever indicated that the admission of a suggestive and unreliable identification would violate due process only if the suggestive circumstances had been orchestrated by law enforcement.

II. The DNA Exonerations Have Confirmed This Court's Concerns About the Unique Dangers Posed By Unreliable Eyewitness Testimony

In recent years, the spate of wrongful convictions exposed by DNA evidence and other means has borne out the Court's long-held concerns about the reliability of eyewitness identification

evidence in general and suggestive identifications in particular. In addition, these exonerations have further demonstrated that the cause of a suggestive identification is irrelevant to whether it contributes to an unfair trial and a wrongful conviction.

According to one study, eyewitness misidentification testimony contributed to the underlying convictions in 76% of the first 250 post-conviction DNA exonerations that occurred in the United States since 1989.[3] Another study of all exonerations from 1989 through 2003 (both DNA and non-DNA) found that 64% of the wrongful convictions involved at least one mistaken identification. *See* Samuel R. Gross *et al.*, *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005) ("The most common cause of wrongful convictions is eyewitness misidentification."). And in its 1996 study of 28 DNA exonerations, the Department of Justice found that, in a majority of the cases, eyewitness misidentifications served as "the most compelling evidence" at trial. *See* U.S. Dep't of Justice, Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, 24 (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf.

To be sure, suggestive police procedures did produce many or most of these eyewitness misidentifications. But as some of the recent DNA exonerations demonstrate, other sources, such as family, friends, and media reports, can produce

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[3] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 9 (2011).

equally pernicious contamination of eyewitness memory -- with an equally corrosive effect at trial.

Take the case of Michael Blair. In 1994, a Texas jury convicted Blair of murdering a seven-year-old girl and sentenced him to death. Three eyewitnesses told police they saw Blair on the day of the victim's disappearance in the park where the victim had last been seen. But by the time the witnesses identified Blair, his picture had already appeared in the news media. In fact, two of these witnesses testified that they identified Blair as the man they had seen in the park only *after* they saw his picture on television. Blair's appearance in the media thus may have influenced the witnesses in identifying Blair as their attacker. Nevertheless, these eyewitness identifications served as key evidence in the prosecution's case, and they were so powerful that it took the jury just 27 minutes to convict Blair. Blair was eventually exonerated after a post-conviction DNA analysis excluded him as the source of biological material found under the victim's fingernails.[4]

The prodding of friends and family members can also produce a suggestive identification, as the wrongful rape conviction of Billy James Smith demonstrates. A man with a knife approached the victim in the laundry room of an apartment building and dragged her into a grassy field near the complex. The perpetrator put a hat over his face and proceeded to rape the victim. After the victim told her boyfriend of the rape, the boyfriend thought the perpetrator could have been Smith,

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[4] *Know the Cases: Michael Blair*, available at http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 2, 2011).

and went down to Smith's apartment. When Smith appeared on the balcony, the victim identified him as the attacker. The supposition by the victim's boyfriend that Smith was the culprit, and his subsequent confrontation with Smith in view of the victim, suggested to the victim that it was indeed Smith who had raped her. Smith was convicted and sentenced to life in prison, largely on the basis of the victim's testimony. DNA testing performed on the rape kit in 2006 showed that the semen was not Smith's. Smith ultimately served nearly 20 years for a rape he did not commit.[5]

As these DNA exonerations demonstrate, suggestive identifications can have a variety of sources other than law enforcement. But no matter the source, the effects of suggestive identifications are the same: an increased risk of an irreparable mistaken identification and the very real potential for a wrongful conviction. It is precisely because of this concern for evidentiary reliability -- a concern that is implicated by suggestive identifications of all types -- that this Court has repeatedly recognized that the admission at trial of a suggestive identification can violate a defendant's due process rights. This Court should now make clear what has long been implicit from its decisions and what two decades of exonerations have conclusively proven: that the admission at trial of a suggestive identification can amount to a due process violation even if the suggestive circumstances are not orchestrated by law enforcement.

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[5] *Know the Cases: Billy James Smith*, available at http://www.innocenceproject.org/Content/Billy_James_Smith.php (last visited Aug. 2, 2011).

III. In Reaffirming *Manson*'s Continuing Importance To the Fundamental Fairness Of Criminal Trials, the Court Should Act To Ensure That the Due Process Analysis Reflects the Significant Development Of Scientific Knowledge Over the Past Three Decades

As noted above, this Court should reaffirm that *Manson*'s due process concerns apply any time the prosecution offers unreliable eyewitness testimony tainted by suggestion at trial, and not simply when that evidence is the product of intentional police misconduct. In so holding, and remanding to the lower court to conduct the required reliability analysis, this Court should provide some guidance as to the nature of the gate-keeping assessment.

A. Behavioral Science Research Over the Past Thirty-Five Years Has Proven That the *Manson* Reliability Test Is Not Currently Meeting the Objectives the Court Set For It

Guidance on remand is necessary because, in the decades since this Court last addressed the issue, the *Manson* reliability test has not met the objectives the Court set for it. A part of the problem has been a misplaced focus by lower courts on police misconduct -- an error the Court's decision in this case should bring to an end. However, some of the lower court confusion has stemmed from a faulty and sometimes reflexive adherence to the list of non-exhaustive factors that *Manson* set forth as

relevant to the reliability determination. Such a reflexive analysis diverts focus from the ultimate question of reliability. More fundamentally, it ignores the past thirty-five years of scientific research, which has identified problems when the *Manson* factors are considered without separating out the corrupting influence of suggestion.

Many empirical studies analyzing the *Manson* factors have concluded that some of them have little or no correlation to the accuracy of an identification.[6] For example, the factor upon which juries place the greatest weight is witness certainty. Cutler & Penrod, *Mistaken Identification*, *supra* n.6, at 181-209. But the vast majority of studies have confirmed that little or no correlation exists between a witness's certainty and the accuracy of the identification. Researchers have also characterized three of the four remaining *Manson* factors as subjective "self report" variables recalled by the witness. Since a suggestive identification procedure can contaminate a

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[6]*See, e.g.*, Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 Law & Hum. Behav. 581 (2000); Gary L. Wells & Amy L. Bradfield, *Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374-75 (1998) [hereinafter *Good, You Identified the Suspect*]; Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765, 785 (1995); Gary L. Wells & Donna M. Murray, *What Can Psychology Say, About the Neil v. Biggers Criteria for Judging Eyewitness Accruacy?*, 63 J. Applied Psychol. 347, 347 (1983). *See generally* Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, And The Law* (1995) [hereinafter *Mistaken Identification*].

witness's memory of the event, these "self report" variables often do not accurately reflect the actual circumstances at the time of the crime. Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 Ark. L. Rev. 231, 265 (2000); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 276-79 (1991).

For example, in an important study published in 1998, subjects viewed a security video and tried to identify the gunman from a photo spread. The actual gunman was not in the photo spread, and all of the eyewitnesses made false identifications. Following the identification, witnesses were given confirming feedback ("good you identified the actual suspect"), disconfirming feedback ("Actually, the suspect is number __"), or no feedback. The type of feedback produced strong effects on the witness' retrospective reports of (a) their certainty, (b) the quality of the view they had, and (c) the clarity of their memory. Those witnesses who were merely told "good, you identified the actual suspect" became even more certain of their (false) identification, remembered having had a better view, and became more confident in the strength of their memories.[7]

The proven tendency of witnesses subjected to suggestive circumstances to artificially inflate their opportunity to observe, the degree of attention they paid, and their level of certainty creates a profound problem for courts attempting to assess

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[7] *Good, You Identified the Suspect*, 83 J. Applied Psychol. at 374-75.

the strength of those self-reported "reliability factors." That problem becomes even worse when combined with *Manson*'s directive to "weigh" the corrupting effects of suggestive identification circumstances against those same reliability factors. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

The Court's balancing directive appears to proceed from the assumption that a separate assessment of reliability can somehow mitigate the reliability concerns inherent in suggestive circumstances. But in reality those very same suggestive circumstances distort the reliability factors. To put it simply, suggestive circumstances will often make an identification seem reliable when it is not, because, for example, a witness who is told he picked the "right" person not only becomes more confident, but also "remembers" having had a better view and having paid more attention to the perpetrator. Thus, this scientific confound, when combined with the *Manson* balancing test, makes it more likely an identification that is the product of suggestive circumstances will be regarded as more reliable under the *Manson* test -- a truly perverse outcome.

B. Any Guidance On Remand About the Appropriate Reliability Analysis Should Remain Cognizant Of the Changed Scientific Landscape and Of Corresponding Renovations By Modern Courts To the Legal Architecture Of *Manson*

Amicus recognizes that this case may not be the appropriate vehicle for fully exploring the

Manson reliability test in light of the current science. But it is essential that any decision from this Court recognizes the undisputed scientific fact that certain of the *Manson* factors may have an inconclusive, misleading or even negative impact on the overall reliability analysis unless considered outside the corrupting influence of suggestion.

To be sure, the due process analysis must still begin from *Manson*'s bedrock reliability principle. Some modern courts have rightly applied that test using all of the factors that scientific research has shown to be relevant, including the opportunity to observe, attention paid, distance, differences between the initial description and the characteristics of the defendant, the time elapsed between the incident and the first identification procedure, any other witness or event variable that affects reliability, and evidence about identification procedures and other potential sources of suggestion or confirming feedback. *See, e.g.*, *Kansas v. Hunt*, 69 P.3d 571, 576 (Kan. 2003) (adopting Utah Supreme Court's refined analysis of *Manson* factors as explained in *Utah v. Long*, 721 P.2d 483 (Utah 1986)).

This Court should encourage the state court in this case to take such a modern approach to its analysis on remand. For example, the state court on remand may find particularly pertinent Professor Geoffrey Loftus's 2005 study regarding the ability of eyewitnesses to identify the faces of strangers from great distances, as the evidence in Mr. Perry's case demonstrated that the witness viewed the culprit from a window two or three

stories above the parking lot.[8] As that study and the exemplars produced by Professor Loftus for this case suggest, it may not even be possible to identify a stranger from such a great distance, fundamentally undermining, if not destroying, the reliability of the identification in this case.[9]

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[8]Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close Than Far Away?*, 12 *Psychonomic Bull. & Rev.* 43 (2005). In the study, Loftus and Erin Harley, PhD, a postdoctoral fellow at the University of California, Los Angeles, conducted a series of experiments with participants who had 20/20 vision or corrected 20/20 vision. They presented participants with small, unrecognizable images of famous people like Julia Roberts, Michael Jordan and George W. Bush, and gradually enlarged the images until the participants could identify each person. The researchers then recorded the size at which each participant recognized the celebrity and then converted this size to a corresponding real-life distance. In another part of the study, Loftus and Harley started with blurred images of the celebrities and then gradually clarified them until the participants could recognize them. The researchers then recorded the amount of blurring that the made the face recognizable. Comparing the relationship between losses in clarity due to size or blurriness allowed Loftus to develop a formula to approximate the amount of detail people who have 20/20 vision lose at a range of distances in normal daytime light.

[9] For purposes of this case, Professor Loftus created two sets of images of the actor Will Smith. The first set consists of three color photographs that approximate how Smith would have looked to the *Perry* witness from her apartment window during daylight hours if Smith were standing at three different distances from her window: (1) 45.9 feet, which is the distance from the witness's apartment that the closest car in *Perry* could have been parked; (2) 94.4 feet, which is the distance from the witness's apartment to the middle of the parking lot; and (3) 182.9 feet, which is the distance from the witness's apartment to the end of the parking lot. *See* Br. for Pet. at 2-5. These images are attached at Exhibit 1. Of

This Court's own analysis need not address these issues at all, but it is critical that it permit the state courts on remand to address them by conducting a full-throated reliability analysis. It is also imperative that this analysis is sensitive to the recent efforts of many lower courts to supplement *Manson's* constitutional protections in order to provide additional safeguards against the danger of wrongful convictions. For example, even where the identification is admitted before the fact-finder, as it will be in most cases, courts have used state evidentiary rules and/or supervisory powers to require carefully-tailored and strongly-worded jury instructions and/or the admissibility of expert testimony concerning modern scientific knowledge that is beyond the ken of the lay juror. *E.g.*, *Brodes v. Georgia*, 614 S.E.2d 766, 769 (Ga. 2005) (advising trial courts to refrain from providing instruction authorizing jurors to consider witness's level of certainty as factor in deciding reliability of identification); *Massachusetts v. Santoli*, 680 N.E.2d 1116 (Mass. 1997) (holding eyewitness jury instructions cannot permit consideration of strength of identification); *Tennessee v. Copeland*, 226 S.W.3d 287, 299 (Tenn. 2007) (finding trial court abused its discretion by excluding expert testimony regarding cross-racial identifications and confirming feedback and noting there are now "literally hundreds of articles in scholarly, legal and scientific journals" that "detail the extensive

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course, the witness identified Perry at night, albeit in a lighted parking lot, so Professor Loftus also recreated black and white images of how Smith would have looked to the witness from the same three distances, which are attached at Exhibit 2.

amount of behavioral science research" in the eyewitness identification field); *New Jersey v. Romero*, 922 A.2d 693, 703 (N.J. 2007) (approving instruction to jurors that an eyewitness' "level of confidence, standing alone, may not be an indication of the reliability of the identification"); *Wisconsin v. DuBose*, 699 N.W.2d 582, 596-97 (Wis. 2005) (holding that evidence obtained from a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary).

Decisions like these demonstrate that, even when identifications are admitted, courts around the country are arming jurors with the knowledge gained from peer-reviewed behavioral science research. Of the various factors related to the witness or event itself, the cross-racial nature of the identification (in which the witness is of one race and the culprit is of another) is perhaps the one that courts have most often recognized as requiring a special instruction. *See, e.g., New Jersey v. Cromedy*, 727 A.2d 457 (N.J. 1999).[10] Such instructions can reduce the risk of error, a risk exemplified by the fact that, in 66 of the first 216 wrongful convictions overturned by DNA testing, cross-racial eyewitness identification was used as evidence to convict an innocent defendant.[11]

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[10] In *Cromedy*, the New Jersey Supreme Court reversed a rape and robbery conviction because the trial court failed to instruct the jury to consider the cross-racial nature of the identification. On remand, DNA testing exonerated Mr. Cromedy. *See Know the Cases: McKinley Cromedy*, http://www.innocenceproject.org/Content/McKinley_Cromedy.php (last visited Aug. 2, 2011).

[11] *Cross-racial Identification and Jury Instruction*, Innocence Blog (May 20, 2008 1:30pm)

Of the factors relating to the circumstances leading to the identification, some courts have recognized the scientific research showing that police should warn the witness that the real culprit may or may not be in the lineup or photo array. *Connecticut v. Ledbetter*, 881 A.2d 290, 316 (Conn. 2005) (exercising supervisory authority to require instruction to jury in cases where police fail to provide such warnings to witnesses). The research has shown these warnings are critical, as they help to reduce relative judgments, in which the witness selects the person who looks "most like" the culprit.[12]

As these courts have recognized, providing jurors with scientifically sound information is entirely consistent with *Manson*'s objective of ensuring that reliability is the linchpin for assessing the admissibility of an identification. In fact, *Manson* fully anticipated that the lower state and federal criminal justice systems would act as laboratories in this fashion, supplementing the constitutional baseline as scientific knowledge advanced. *See Manson v. Brathwaite*, 432 U.S. 98,

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http://www.innocenceproject.org/Content/Crossracial_identification_and_jury_instruction.php.

[12] *See generally*, Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & Hum. Behav. 283 (1997). In one study, for example, 54% of eyewitnesses were able to identify the actual culprit from a 6-person culprit-present lineup and 21% made no identification. When the culprit was removed without replacement (making it a 5- person culprit-absent lineup), however, the rate of no identification rose only to 32%, with the other 68% of the eyewitnesses mistakenly identifying someone from the five remaining members of the lineup. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 Am. Psychologist 553 (1993).

117 (1977). This Court's due process decisions, by making reliability the linchpin and by acknowledging the unique role of misidentifications in producing miscarriages of justice, sparked a generation of jurisprudence dedicated to remedying the problem.

The work continues. Most importantly, on June 18, 2010, Special Master Geoffrey Gaulkin, upon the direction of the New Jersey Supreme Court, issued an extensive report after a ten-day evidentiary hearing devoted to the following issue:

> "whether the assumptions and other factors reflected in the two-part *Manson*[*v. Brathwaite*] test, as well as the five factors outlined in th[at] case[] to determine reliability, remain valid and appropriate in light of recent scientific and other evidence."

Geoffrey Gaulkin, *Report of the Special Master, New Jersey v. Henderson*, Case No. A-8-08 at 3 (June 18, 2010).[13]

The *Henderson* Report identified a number of "renovations to the legal architecture of *Manson*" that can help to ensure that the reliability analysis takes full advantage of the current state of scientific knowledge. *Id.* at 84-86. The Report most importantly concluded that any application of the *Manson* "weighing" process should take into account that the factors identified by the Court are

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[13]Available at http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF (quoting New Jersey Supreme Court orders).

sensitive to the manner in which the corrupting influence of suggestion can actually skew the reliability factors identified by the Court. *Id.* at 78-79. It also encouraged courts to consider other reliability factors whose importance has been demonstrated by the science. *Id.* at 84-86.

Amicus applauds this development and others like it, and encourages the Court to use its decision in this case to foster such developments, which improve the accuracy and fairness of our criminal justice system.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of New Hampshire should be reversed.

Respectfully submitted,

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August 5, 2011

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EXHIBIT 1

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Photo A

Photo B

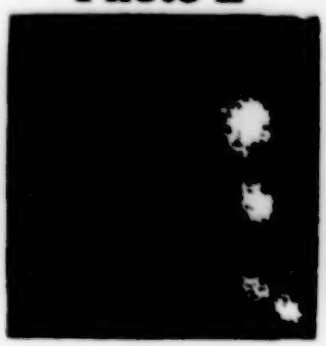
Photo C

EXHIBIT 2

Photo D: Will Smith's face as it would appear to the *Perry* witness during evening hours if Smith were standing 45.9 feet from the witness's apartment window, which is the approximate distance from the witness's apartment that the closest car in *Perry* could have been parked:	**Photo E:** Will Smith's face as it would appear to the *Perry* witness during evening hours if Smith were standing 94.4 feet from the witness's apartment window, which is the approximate distance from the witness's apartment to the middle of the parking lot:	**Photo F**: Will Smith's face as it would appear to the *Perry* witness during evening hours if Smith were standing 182.9 feet from the witness's apartment window, which is the approximate distance from the witness's apartment to the end of the parking lot:

Photo D

Photo E



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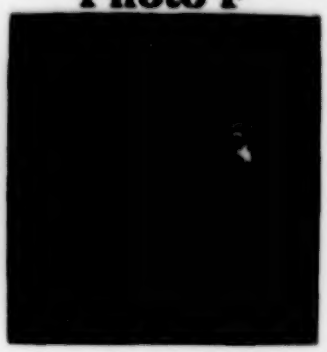

AMICUS CURIAE BRIEF

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AND
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SUPREME COURT, U.S.
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No. 10-8974

In the Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF FOR THE STATE OF LOUISIANA, 28 OTHER STATES, AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the New Hampshire Supreme Court correctly determined that the admission at trial of a pretrial identification cannot violate due process where no improper state action has caused the circumstances under which the identification was made.

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INTERESTS OF *AMICI* STATES

The states have a well-established interest in regulating the procedures under which their laws are carried out, *Patterson v. New York*, 432 U.S. 197, 201 (1977), and, accordingly, in "promulgat[ing] their own rules of evidence . . . in their own state courts." *Spencer v. Texas*, 385 U.S. 554, 568-69 (1967). State decisionmaking in this area is "not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

In this case, petitioner contends that a criminal defendant has a generalized due process interest in the reliability of eyewitness identification testimony, even absent any state action improperly influencing the witness's identification. Petitioner's ill-advised rule would constitutionalize a rule of evidence in order to protect an amorphous reliability interest found nowhere in the Constitution's text. Because such a rule would directly undermine their prerogative to establish rules of evidence, *amici* States urge the Court to reject petitioner's argument.

SUMMARY OF THE ARGUMENT

Law enforcement officials often use procedures such as lineups or photo displays to help eyewitnesses identify the perpetrator of a crime. If properly conducted, these procedures are an invaluable investigative tool; if abused, they undermine a fair trial. Consequently, the Court has

frequently considered whether admission of eyewitness testimony tainted by improper identification procedures violates the Constitution. *See, e.g., Simmons v. United States*, 390 U.S. 377, 384 (1968) (addressing when due process is violated by "impermissibly suggestive" police procedures). Decades of litigation have produced a sensible constitutional rule: due process bars evidence derived from an improper identification procedure unless the evidence is sufficiently reliable to offset the corrupting effect of that procedure. *See Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). Central to all these cases has been improper state action—a skewed lineup, say, or a biased photo array—that allows the state to stack the deck against a defendant by, in effect, saying to a witness, "This is the man." *Foster v. California*, 394 U.S. 440, 443 (1969).

Petitioner now urges the Court to subtract from this line of cases the basic requirement of state action. The Court should reject that invitation for several reasons.

First, the rules announced in the Court's identification caselaw make no sense outside the context of state action. State action in the form of a concrete police identification procedure is inseparable from the Court's analysis in literally every decision. *See* Part I(A), *infra*. Petitioner manages to obscure this fact only by using highly selective quotations from the Court's opinions. This fundamental misreading of the Court's rulings leads petitioner to focus on "reliability" and nothing else. *See* Part I(B), *infra*. But the Court has never

announced a freestanding due process interest in reliable evidence. To the contrary, reliability becomes a factor in due process analysis only *after* a defendant has shown an unnecessarily suggestive police procedure—and then only as a means of *admitting* evidence that would otherwise have been excluded. Petitioner would thus turn the Court's eyewitness identification jurisprudence on its head. Furthermore, his rule excluding state action from the due process analysis ignores the well-established principle that due process applies only "to acts of the states, not to acts of private persons or entities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

Second, petitioner's proposed rule would improperly constitutionalize a rule of evidence. *See* Part II, *infra*. Nothing in the Constitution authorizes the Court to promulgate an evidentiary code. The Court has intervened in evidentiary matters only when admission of certain evidence would violate a specific constitutional guarantee. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 50-51 (explaining that "not all hearsay implicates the Sixth Amendment's core concerns"). Absent that, the Court has declined to usurp states' authority over evidentiary rules or to interfere with a jury's ability to weigh facts. In the eyewitness identification context, constitutional rules are meant to account for improper state influence on witnesses, not to protect a fictional due process interest in reliable evidence. Courts could not hope to construct (and consistently apply) any test that would measure the myriad variables affecting "reliability." And, if they tried, they would soon find themselves swamped with

suppression challenges in every case that involved identification evidence.

Finally, states have a substantial interest in ensuring that eyewitness identifications are used fairly in criminal trials, and they are fully capable of adapting their rules and procedures to do so. *See* Part III, *infra*. States have actively implemented measures ranging from law enforcement guidelines to revised evidentiary rules in response to advances in scientific understanding. Several state supreme courts have in fact implemented protocols for addressing the situation at issue here—identifications influenced by factors outside of state control. *See, e.g., State v. Chen*, 25 A.3d 256, 261-62, 268-69 (N.J. 2011) (holding that while such identifications do not implicate due process concerns, they should nevertheless be evaluated for reliability under a modified *Manson* test). Simply put, states are best suited to address concerns about the reliability of eyewitness testimony, and the Court should not undermine their efforts by recognizing the amorphous due process interest petitioner advocates.

ARGUMENT

STATE ACTION IS A PREREQUISITE FOR DUE PROCESS PROTECTION

A. The Court's eyewitness caselaw makes no sense outside the state-action context

Petitioner contends that the Due Process Clause bars admission of eyewitness testimony arising from

"impermissibly suggestive circumstances," regardless of whether those circumstances were the product of state action. Br. at 8. This Court's decisions, however, support no such free-floating due process interest in the reliability of eyewitness evidence. Petitioner must therefore construct his argument from phrases misleadingly excerpted from the Court's opinions. *See, e.g.*, Br. at 9, 14, 17 (citing *Manson v. Braithwaite*, 432 U.S. 98, 114 (1997), for the proposition that "reliability is the linchpin in determining the admissibility of identification testimony"). When the language petitioner relies on is placed in proper context, however, his argument crumbles. At the heart of every one of the Court's eyewitness identification cases is the necessary predicate of state action in the form of improper police procedures. If that state action is subtracted, as petitioner's argument requires, then the rules announced in those cases simply make no sense.

The Court first considered the admissibility of pretrial eyewitness confrontations in the late 1960s. In the first such case, *United States v. Wade*, 388 U.S. 218 (1967), it ruled that a pretrial lineup was a "critical stage" at which the accused was entitled to counsel under the Sixth Amendment. *Id.* at 236. Animating the Court's decision was concern over "the degree of suggestion inherent in [police identification procedures]," *id.* at 228, and the attendant difficulty of challenging those procedures during trial:

> [A]ny protestations by the suspect of the fairness of the lineup made at trial are likely

> to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

Id. at 231. The Court accordingly held that, in cases of tainted post-indictment identification procedures, a witness would be allowed to provide in-court identification testimony only if the state established by clear and convincing evidence that the in-court identification had an independent source, or that the introduction of the evidence was harmless error. *Id.* at 240-42.

In a case decided along with *Wade*, *Stovall v. Denno*, 388 U.S. 293 (1967), the Court addressed the due process concerns implicated by police identification procedures. *Stovall* involved a hospital-room "showup" without the presence of counsel. *Id.* at 295. Setting aside the right-to-counsel issue,[1] the Court held that a pretrial confrontation could violate due process if it was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law." *Id.* at 301-02. The propriety of the police procedure would turn on "the totality of the circumstances surrounding it."

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[1] The Court held, as an initial matter, that *Wade* did not apply retroactively and that Stovall therefore had no Sixth Amendment claim. *Id.* at 300-01.

Id. at 302. Applying that test, the Court concluded that, because no one knew how long the victim might live, the hospital-room showup had been proper. *Id.* at 302.

The Court reaffirmed *Stovall* in *Simmons*, a bank robbery case in which bank employees had identified the defendant on the basis of photographs shown to them by the police shortly after the robbery. 390 U.S. at 380-81. In rejecting the petitioner's argument that it should categorically prohibit such photo presentations, the Court reasoned that any generalized risk of misidentification would be "substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Id.* at 384. The Court instead instructed that each case must be considered on its own facts, and that eyewitness identifications at trial following pretrial photographic identifications would be set aside on due process grounds "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[2]

Applying these principles, the Court invalidated a pretrial identification proceeding on due process grounds in *Foster*. There, a witness finally identified the defendant after two highly irregular lineups and an individual showup. 394 U.S. at 443. "In effect,"

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[2] This "irreparable misidentification" language appears to derive from *Wade*'s discussion of lineups that deprive a defendant from "meaningfully . . . attack[ing] the credibility of the witness' courtroom identification." 388 U.S. at 231.

the Court reasoned, "the police repeatedly said to the witness, 'This is the man,'" and thus violated the defendant's right to due process. *Id.*

The Court began to limit the reach of these decisions in the 1970s. In *Kirby v. Illinois*, for example, the Court limited *Wade*'s right-to-counsel requirement to post-indictment lineups. 402 U.S. 682, 690 (1972). The Court likewise ruled in *United States v. Ash* that there was no right to counsel during pre- or post-indictment photographic lineups. 413 U.S. 300, 321 (1973). At the same time, the Court also lowered the due process barriers to admission of evidence derived from imperfect identification procedures.

The Court first did so in *Neil v. Biggers*, 409 U.S. 188 (1972), a case involving a pre-*Stovall* station-house showup. *Id.* at 195, 199. Declining to adopt a *per se* rule of exclusion, the Court instead applied a "totality of the circumstances" analysis guided by factors including: "the witness's level of certainty when identifying the defendant ... *at the time of the confrontation*," and "the length of time between the crime and *the confrontation*." *Id.* at 199-200 (emphasis added).[3] Just as previous decisions, *Biggers* reiterated that "the primary evil to be

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[3] The other factors addressed the reliability of the witness' identification of the suspect prior to the police-orchestrated confrontation. *See id.* at 199-200 (relying on "the witness's opportunity to view the perpetrator at the time of the crime; the witness's degree of attention at the time of the crime; and the accuracy of the witness's prior description of the perpetrator").

avoided is 'a very substantial likelihood of irreparable misidentification,'" *id.* at 381 (quoting *Simmons*, 390 U.S. at 384), and that "it is the likelihood of misidentification which violates a defendant's right to due process." *Id.* at 381-82. Those observations, obviously, were made in the course of analyzing the due process concerns created by a police-orchestrated station-house showup.[4]

The Court used the same approach five years later in *Manson*, which held that identifications derived from post-*Stovall* confrontations should be tested under the same totality of the circumstances analysis. In *Manson*, an undercover officer had purchased drugs from a suspect and later identified the seller based on a photograph left on his desk by another police officer. 432 U.S. at 100-01. Disagreeing with lower courts, the Court rejected *per se* exclusion of the identification. *Id.* at 108-09. The Court's opinion emphasized that the due process interests at stake were readily protected by the normal methods for testing evidence at trial:

> While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process. Counsel can both cross-examine the identification

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[4] Given that the victim in *Biggers* had been raped and spent nearly a half-hour with the assailant in good light, the Court concluded that, on balance, there was no substantial likelihood for misidentification, even though the identification procedure had been unnecessarily suggestive. *Id.* at 200-01.

> witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification.

Id. at 113 n.14 (quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring)). The Court thus concluded that "reliability is the linchpin in determining the admissibility of identification testimony *for both pre- and post-Stovall confrontations*." *Id.* at 114 (emphasis added).

The Court further diminished due process barriers to introduction of identification evidence in *Watkins v. Sowders*, 449 U.S. 341 (1981). The question in *Sowders*—which consolidated cases involving allegedly improper lineups, photographic arrays, and showups—was whether due process required a hearing outside the jury's presence whenever a defendant asserts that a witness's identification was tainted by improper procedures. The Court answered in the negative, noting that while such hearings are prudent, they are not constitutionally required. *Id.* at 349. Writing for the majority, Justice Stewart emphasized that the reliability of identification evidence is primarily a question for jurors:

> Where identification evidence is at issue . . . the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability

> of that evidence.... Under our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth.

Id. at 347, 349.

In sum, the current due process standard for evaluating eyewitness testimony has emerged from several decades of development in this Court's jurisprudence. A criminal defendant challenging an eyewitness identification under the Due Process Clause must first show that law enforcement officers used an identification process that was "unnecessarily suggestive." *Manson*, 432 U.S. at 106. If so, the reviewing court must then apply the *Biggers* factors to determine the independent reliability of the in-court identification. These factors are to be weighed against "the corrupting effect of the suggestive identification itself." *Id.* at 114. State courts would be prudent to conduct a hearing on these issues outside the presence of the jury, but there is no *per se* constitutional requirement that they do so. *Sowders*, 449 U.S. at 349.

B. Petitioner fundamentally misconstrues the function of reliability in the Court's holdings

Petitioner's argument that state action is *not* a prerequisite for a due process challenge to eyewitness testimony is incomprehensible in light of the Court's cases. Simply put, the presence of orchestrated police procedures has been a necessary

predicate of the Court's analysis in every single one if its eyewitness identification cases, whether dealing with the Sixth Amendment right to counsel or the Due Process Clause. For instance, its first decision, *Wade*, spoke of the dangers inherent in "[t]he confrontation *compelled by the State* between the accused and the victim or witnesses to a crime." 388 U.S. at 228 (emphasis added). Or again, *Stovall* defined the claim as whether "the *confrontation conducted* in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification" that it denied petitioner due process. 388 U.S. at 301-02 (emphasis added). And the issue in *Sowders* was whether due process requires a hearing when a defendant "has proffered some evidence that *pretrial police procedures* directed at identification were impermissibly suggestive." 449 U.S. 341, 350 (Brennan, J., dissenting) (emphasis added); *see also id.* at 351-52 (noting that the Court's caselaw had "held admissible identification evidence tainted by suggestive *confrontation procedures* and lacking sufficient indicia of reliability") (emphasis added).

Petitioner's strategy for avoiding the obvious thrust of the Court's cases is simply to airbrush any contrary language out of the picture. For instance, Petitioner relies heavily on *Manson's* phrase that 'reliability is the linchpin," see Br. at 9, 14, 17, 24, 29. But reading the *entire* sentence shows what the Court was really talking about:

> Reliability is the linchpin in determining the admissibility of identification testimony *for both pre- and post-Stovall confrontations.*

432 U.S. at 114 (emphasis added). In other words, police-orchestrated confrontations lay at the core of the rule. Further, the Court's ultimate holding answered the original question presented, which was:

> [W]hether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a *police procedure* that was both suggestive and *unnecessary*.

Id. at 106 (emphasis added). Thus, the Court viewed evidence of an "unnecessarily suggestive police procedure" as a prerequisite for application of the *Biggers* reliability factors. *Id.* at 114 ("Against these factors is to be weighed the corrupting effect of the suggestive identification itself."). By contrast, these decisions provide no support for petitioner's argument that there is a free-floating due process interest in "reliability" untethered from police-supervised procedures.

Justice Marshall reinforced this point in his *Manson* dissent. In urging a *per se* exclusionary rule, he cautioned that "impermissibly suggestive identifications are not merely worthless *law enforcement tools*. They pose a grave threat to society at large in a more direct way than most

governmental disobedience of the law." *Id.* at 127 (Marshall, J., dissenting) (emphasis added). The majority responded that, while a *per se* rule would have the more significant deterrent effect, a more flexible rule would still encourage police to avoid unnecessarily suggestive procedures. *Id.* at 112.

Just as there is no way to excise state action from *Manson*'s holding, there is no way to excise it from *Biggers*. Petitioner repeatedly notes phrases from *Biggers* such as, "[t]he primary evil to be avoided is 'a very substantial likelihood of misidentification,'" 409 U.S. at 198 (quoting *Simmons*, 390 U.S. at 384), and "[i]t is the likelihood of misidentification which violates a defendant's right to due process . . . ." *Id.*; *see, e.g.*, Br. at 14, 16, 32. But Petitioner again misleadingly subtracts the text from its context. The very next sentences of the opinion read:

> Suggestive *confrontations* are disapproved because they increase the likelihood of misidentification, and *unnecessarily* suggestive *confrontations* are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a *showup* without more does not violate due process.

Id. (emphasis added).

Petitioner's selective quotations of *Manson* and *Biggers* badly obscure the underlying point of those decisions: reliability was central to the Court's analysis *only* as a means of testing the admissibility

of eyewitness evidence derived from unnecessarily suggestive police procedures. Neither of those decisions, however, in any way supports petitioner's radical suggestion that courts may wield the Due Process Clause to test the "reliability" of any eyewitness evidence, regardless of whether it is derived from police-orchestrated procedures.

The vast majority of courts, including the New Hampshire Supreme Court below, have accordingly recognized the necessity of state action for due-process eyewitness-identification claims. *See, e.g.*, *Chen*, 25 A.3d at 261-62 ("This case is not about governmental conduct. It therefore does not implicate due process concerns raised by suggestive police procedures."); *People v. Owens*, 97 P.3d 227, 233 (Colo. Ct. App. 2004) (adopting the approach of the "majority of jurisdictions" requiring state action).[5]

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[5] *See also, e.g.*, *United States v. Sharpe*, 193 F.3d 852, 868 (5th Cir. 1999); *Reese v. Fulcomer*, 946 F.2d 247, 259 (3d Cir. 1991); *United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir. 1986); *United States v. Peele*, 574 F.2d 489, 491 (9th Cir. 1978); *Clency v. State*, 475 So. 2d 642, 644 (Ala. Crim. App. 1985); *Kimble v. State*, 539 P.2d 73, 77 (Ak. 1975); *State v. Nordstrom*, 25 P.3d 717, 729 (Ariz. 2001); *People v. Peggese*, 102 Cal. App. 3d 415, 422 (Cal. Ct. App. 1980); *State v. Holliman*, 570 A.2d 680, 684 (Conn. 1990); *Green v. State*, 614 S.E.2d 751, 755 (Ga. 2005); *People v. Bynum*, 348 N.E.2d 194, 196 (Ill. App. Ct. 1976); *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993); *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa Ct. App. 1996); *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985); *State v. Daughtery*, 563 So. 2d 1171, 1174 (La. Ct. App. 1990); *Com. v. Colon-Cruz*, 562 N.E.2d 797, 805 (Mass. 1990); *Tidwell v. State*, 784 S.W.2d 645, 647 (Mo. Ct. App. 1990); *People v. Rose*,

Furthermore, the necessity of state action in this context is consistent with the Court's requirement of it elsewhere. The law is well-established that the Due Process Clause "applies to acts of the states, not to acts of private persons or entities." *Rendell-Baker*, 457 U.S. at 837; *see also Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (explaining that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."). This understanding has remained undisturbed for more than a century:

> Civil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong . . . . [that may be] vindicated by resort to the laws of the state for redress.

The Civil Rights Cases, 109 U.S. 3, 17 (1883). Thus, as the Court explained in *Colorado v. Connelly*, 479 U.S. 157 (1986), even "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that

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219 A.D.2d 564, 564-65 (N.Y. App. Div. 1995); *State v. Brown*, 528 N.E.2d 523, 532 (Ohio 1988); *State v. Pailon*, 590 A.2d 858, 863 (R.I. 1991); *State v. Reid*, 91 S.W.3d 247, 272 (Tenn. 2002); *Rogers v. State*, 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State*, 106 S.W.3d 72 (Tex. Crim. App. 2003); *State v. Marshall*, 284 N.W.2d 592, 599 (Wis. 1979).

evidence inadmissible under the Due Process Clause." *Id.* at 166.

Petitioner's response is halfhearted at best: he argues that *Connelly* is inapposite because it (a) dealt with involuntary confessions by mentally ill defendants, a category of evidence that does not "warrant special protection," (b) rejected reliability as a factor, whereas the Court's identification cases declare it a guiding factor, and (c) involved a rule of deterrence, which is not a consideration in eyewitness cases. Br. at 33.

But all three of these points flatly ignore the extensive body of caselaw echoing this same point in other contexts. *See, e.g.*, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 925, (1982) (taking of property without due process); *Rendell-Baker*, 457 U.S. at 837 (termination of pseudo-public employee); *Shelley*, 334 U.S. at 13 (enforcement of discriminatory housing covenants). Nothing about the language of *Connelly* or any of these other cases indicates that the state-action requirement depends on the context of the particular claim at issue; instead, the Court has consistently and unambiguously stated that due process protections simply do not apply to private conduct.

Petitioner's deterrence point additionally misses the mark for the reason that the deterrence objective of a due process evidentiary exclusion is irrelevant to the state-action requirement. Even if deterrence *were* relevant, however, the Court's eyewitness identification cases explicitly note that deterrence was a factor in excluding unnecessarily suggestive

testimony. *See Manson*, 432 U.S. at 112 (noting that, while a *per se* rule of exclusion would have more deterrent effect, a totality-of-the-circumstances approach would still lead police to use more reliable procedures).

In sum, Petitioner's argument that suggestive identifications implicate due process absent state action is flatly contradicted by this Court's caselaw.

II. The Court Should Decline Petitioner's Invitation to Constitutionalize a Rule of Evidence

In addition to its utter lack of jurisprudential pedigree, petitioner's proposed rule makes little sense from either a constitutional or a practical perspective. It asks the Court to consitutionalize a rule of evidence based on a nonexistent due process interest in evidentiary reliability, something the Court has never done in any other area. Moreover, from the standpoint of the practical administration of criminal justice, the rule would be a disaster.

The Constitution does not authorize the Court to promulgate a Code of Evidence. An evidentiary matter may raise a constitutional question, to be sure, but only because it happens to implicate a specific guarantee secured by the Constitution. For instance, admission of hearsay violates the Constitution in certain cases, not because hearsay is "unreliable," but because the Constitution promises an accused the right to confront witnesses against him. *See, e.g., Crawford*, 541 U.S. at 50-51 (explaining that, while the two doctrines overlap,

"not all hearsay implicates the Sixth Amendment's core concerns"). Similarly, the Court requires testimony by a minimum of two witnesses in treason cases, *see, e.g., Haupt v. United States*, 330 U.S. 631, 640-41 (1947), not because uncorroborated testimony is less reliable, but because the Constitution expressly demands it. U.S. CONST. art. III § 3.

One searches in vain, however, for the Constitution's "Reliable Evidence Clause." In other words, generalized concerns about evidentiary reliability do not trigger constitutional protection. *See Crawford*, 541 U.S. at 67-69 (rejecting reliability as an inadequate gauge for constitutional guarantees). As Justice Black once explained, the Founders did not draft the Bill of Rights "merely in order to mention a few types of evidence 'for illustration,'" while leaving the Court with the residual power to invalidate any other evidence the Justices deem unreliable. *Foster*, 394 U.S. at 449 (Black, J., dissenting). Petitioner seeks to do exactly what Justice Black condemned. He would elevate the admission of any eyewitness identification to constitutional magnitude based solely on a judge's assessment of that evidence's "reliability." The Constitution provides no warrant for such a rule.

As discussed in Part I(A), *supra*, the Court's eyewitness identification cases illustrate this principle. Evidence is excluded precisely because the police connived in its creation by manipulating witness confrontations. As the Court said in *Foster*, 394 U.S. at 443, "[i]n effect, the police repeatedly sa[y] to the witness, 'This is the man.'" "Reliability"

factors in only as way of salvaging evidence not entirely corrupted by suggestive procedures. *Manson*, 432 U.S. at 114 (balancing reliability factors against the influence of the unnecessarily suggestive confrontation). The bottom line is that the constitutional question arises from the corrupt police practice, not from any free-floating concern with "reliability" of evidence.

Importantly, the Court has refused to constitutionally police other types of evidence that—just like eyewitness testimony—are highly impactful yet potentially unreliable. For instance, scientific or expert testimony may exercise extraordinary influence on a jury, but the Court has ruled that its admission is governed by rules of evidence, not by the Constitution. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). Because *Daubert* did not announce a constitutional requirement, states are free to develop their own rules for admission of this evidence. *See State v. O'Key*, 899 P.2d 663, 672 n.7 (Or. 1995) ("As a statutory case, rather than a constitutional case, *Daubert* is not binding on the states."). The Court has taken the same approach with respect to polygraph evidence. *See Scheffer*, 523 U.S. at 312 ("Individual jurisdictions . . . may reasonably reach differing conclusions as to whether polygraph evidence should be admitted."); *see also Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) ("The admission of testimony concerning polygraph tests does not rise to a constitutional violation."). Accepting Petitioner's argument for a generalized due process interest in reliability would consign

long-established evidentiary rules like these to constitutional limbo.

Adopting Petitioner's rule would also undercut the central role juries have always played in our legal system. "It is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts." *Foster*, 394 U.S. at 447 (Black, J., dissenting). And in cases based on eyewitness evidence, assessing the reliability of that evidence will often be the jury's *only* duty. *See, e.g., Sowders*, 449 U.S. at 347. Thus, "[t]o take that power away from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform." *Foster*, *ibid*. It is no exaggeration to say, then, that petitioner's rule would fundamentally recast the respective roles of judge and jury in criminal trials. With respect to eyewitness evidence, judges would essentially assume the core function of assessing the "reliability," and hence the veracity, of the most critical witnesses in criminal proceedings.

Finally, constitutionalizing a rule of evidentiary reliability would intrude on powers reserved to, and long exercised by, the states. The states have a well-established power "to promulgate their own rules of evidence . . . in their own state courts . . . ." *Spencer*, 385 at 568-69. And as Justice Stevens noted in *Manson*, "this rulemaking function can be performed more effectively by the legislative process than by somewhat clumsy judicial fiat, and ... the Federal Constitution does not foreclose experimentation by the states in development of such rules." *Manson*,

432 U.S. at 118 (Stevens, J., concurring). The states have developed rules to account for eyewitness identifications, *see* Part III, *infra*, and the Court should not undermine these efforts.

Aside from these glaring constitutional deficiencies, Petitioner's rule would also be virtually impossible to apply in any coherent fashion. Consistency would be the primary casualty. Judges applying the *Manson/Biggers* factors have done so in the familiar realm of police procedures such as lineups, showups, and photo arrays. These are concrete law enforcement procedures easily accessible to judges. The judicial mind can therefore readily grasp how irregularities in those procedures can skew their legitimate uses and irremediably prejudice a criminal defendant.

Petitioner would widen the due process analysis beyond police procedures to encompass *anything* bearing on the reliability of an eyewitness identification. This promises disastrous confusion, because the list of potential reliability factors could literally go on forever. As the New Jersey Supreme Court has observed in this context: "How dark is too dark as a matter of law? How much [stress] is too much?" *State v. Henderson*, No. A-8-08-62218, 2011 WL 3715028, at *48 (N.J. Aug. 24, 2011). Judges have no guideposts to make such free-ranging assessments, and they would invariably reach wildly disparate conclusions. And because the variables would by definition lie outside governmental control, rulings would have no deterrent impact against

future occurrences. *See* Manson, 432 U.S. at 112 (describing deterrent impact of exclusions on police).

Implementation of Petitioner's rule would also severely strain the criminal justice system. Defendants would surely demand a hearing in virtually every case in which eyewitness identification plays a part, threatening to overwhelm the system. *Henderson*, 2011 WL 3715028, at *49. And the impact would not be limited to trial courts: challenges to admission of identification evidence would likely become a routine feature of direct appeals and habeas petitions.

In sum, the numerous constitutional and practical problems posed by Petitioner's rule dictate that the Court should reject it.

III. States are Well-Equipped to Address Concerns About the Reliability of Eyewitness Identification Evidence

States have a fundamental interest in ensuring that criminal prosecutions are conducted fairly. Towards that end they have developed and refined rules of evidence and procedure that promote reliability in the determination of guilt and innocence. These standards are not static: they have evolved to reflect scientific understanding and societal expectations. For instance, serious concerns about the reliability of polygraph evidence have led most states to exclude it from criminal trials. *United States v. Scheffer*, 523 U.S. 303, 311 (1998) (discussing cases).

The eyewitness identification context is no different. States have enacted a wide variety of measures to ensure that eyewitness evidence is fairly obtained and properly presented. With regard to law enforcement procedures—the only identification variables within the states' control—many states have taken steps to eliminate reliability concerns at the outset. A number have adopted guidelines providing best practices for identification procedures. For instance, the California Commission on the Fair Administration of Justice has recommended double-blind and sequential identification procedures, mandatory recording of lineups and photo displays, the provision of cautionary instructions to witnesses, and training against displaying confirming feedback to witnesses. Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations Regarding Eyewitness Identification Procedures* (2006).[6]

Other states have passed legislation addressing identification issues. Maryland, for example, has required all state law enforcement agencies to adopt

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[6] *See, also, e.g.* Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (2001); Task Force on Wrongful Convictions, N.Y. State Bar Ass'n, *Final Report of the New York State Bar Association's Task Force on Wrongful Convictions* (2009); Governor's Comm'n on Capital Punishment, State of Ill., *Report of the Governor's Commission on Capital Punishment* (2002); N.C. Actual Innocence Comm'n, *Recommendations for Eyewitness Identification* (2003) Office of the Attorney Gen., Wis. Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification* (2005).

written eyewitness identification policies that comply with United States Department of Justice Standards. *See* MD. CODE ANN., PUB. SAFETY § 3-506 (2009). And Ohio has mandated a variety of lineup procedures and required courts to take noncompliance with these rules into account when conducting suppression hearings or instructing juries on assessing reliability. OHIO REV. CODE § 2933.83 (2011).[7]

Further, numerous state courts have acknowledged post-*Manson* scientific findings and incorporated them into their rulings. Most recently, in *Henderson*, the New Jersey Supreme Court performed a sweeping survey of the scientific literature in announcing a new test for admission of such evidence. 2011 WL 3715028 at *9-37, 45-47. Although the court said evidence of state action is required to trigger a suppression hearing, the state must then offer proof that the identification is

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[7] *See, also, e.g.*, 2011 Conn. Acts 11-252 (effective Oct. 1, 2011) (setting procedures for lineups and photo arrays and establishing task force to study identification issues); 725 ILL. COMP. STAT. ANN. 5/107A-5 (2009) (mandating a variety of lineup reforms, including recording of all lineups, special instructions for witnesses, and requirement that lineup fillers appear substantially similar to witness's previous description of suspect); N.C. GEN STAT. § 15A-284.50-.53 (2009) (enacting comprehensive lineup guidelines along with legal remedies for noncompliance); 2007-60 VT. ADV. LEGIS. SERV. (LexisNexis 2007) (establishing committee to study best practices for eyewitness identification procedures); W. VA. CODE § 62-1E-1 to -3 (2008) (imposing lineup reforms and creating best-practices task force); WISC. ST. ANN. § 177.50 (2011) (requiring law enforcement agencies to adopt procedures to reduce the likelihood of inaccurate identifications).

reliable, considering a variety of both state-caused and external variables. *Id.* at *45. Twenty years before *Henderson*, the Utah Supreme Court crafted its own criteria for assessing the reliability of suggestive identifications, finding "some of [the *Biggers*] criteria to be scientifically unsound." *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991).[8]

State courts have also addressed the issue at the heart of this case—suggestive influences by variables other than state action—under laws of evidence. In *Chen*, a companion case to *Henderson*, the New Jersey Supreme Court clarified that non-governmental suggestive influences do not trigger due process protection, but introduced a modified approach for assessing reliability of eyewitness identification based on the court's *Henderson* test. 25 A.3d at 268-69. Similarly, the Connecticut Supreme Court held in *State v. Holliman*, 570 A.2d 680 (Conn. 1990), that even if an identification challenge did not involve state action—and therefore lacked a constitutional basis—the criteria in *Manson* were "appropriate guidelines by which to determine the admissibility of identifications that result from

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[8] The body of state caselaw taking into account scientific critiques of the reliability of eyewitness testimony is too extensive to adequately catalogue here. However, representative cases include *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005); *Brodes v. State*, 614 S.E.2d 766 (Ga. 2005); *State v. Warren*, 635 P.2d 1236 (Kan. 1981); *Commonwealth v. Silva-Santiago*, 906 N.E.2d 299 (Mass. 2009); *People v. LeGrand*, 867 N.E.2d 374 (N.Y. 2007); *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007); and *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005).

procedures conducted by civilians." *Id.* at 684. And in *State v. Hibl*, 714 N.W.2d 194 (Wis. 2006), the Wisconsin Supreme Court held that even when there is no action by law enforcement, courts "still have a gate-keeping function" to assess the reliability of identification evidence under Wisconsin's equivalent of Federal Rule of Evidence 403. *Id.* at 204-05.

These cases illustrate that state courts are fully capable of addressing reliability issues with identification evidence using evidentiary principles. Yet even apart from special examinations into reliability of such evidence, several basic features of state criminal procedure offer protection to defendants in Petitioner's situation. First, in cases where identification testimony is expected to be a prominent issue, defendants may be allowed to utilize peremptory challenges to select jurors who indicate an openness to criticisms of eyewitness evidence. *See Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) ("[I]t is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."); *cf. Rhone v. State*, 492 N.E.2d 1063, 1064 (Ind. 1986) (upholding state's peremptory strike of a potential juror due to her expressed reluctance to convict on the basis of a single eyewitness's testimony). Additionally, defense counsel can use cross-examination to thoroughly expose any factors that may undermine an eyewitness's testimony. "Cross-examination [is] the greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks and citation omitted), and is "the device best

suited to determine the trustworthiness of testimonial evidence," *Sowders*, 449 U.S. at 349.

Several states also allow defendants to present expert testimony on the reliability of eyewitness identification evidence. *See, e.g., Henderson,* 2011 WL at 3715028 at *51; *LeGrand,* 867 N.E.2d at 378-79. At least one state supreme court—Utah's—has actively encouraged the use of experts. *See State v. Clopten*, 223 P.3d 1103, 1118 (Utah 2009) ("We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony."). As noted in *Clopten*, expert testimony may be a powerful supplement to cross-examination in cases where eyewitnesses are mistaken, yet display a high degree of confidence in their testimony. *Id.* at 1110.

Finally, defense counsel can again attack eyewitness testimony in closing argument. *See Manson,* 432 U.S. at 114 n.14. The court may then instruct the jurors on the proper standards for evaluating such evidence. *See, e.g., Henderson*, 2011 WL 3715028 at *51-52 (mandating development of model jury instructions considering generally accepted scientific evidence); *Sowders*, 449 U.S. at 347 ("Where identification evidence is at issue, however, no . . . special considerations justify a departure from the presumption that juries will follow instructions.").

In sum, outside the context of suggestive police confrontations, the reliability of eyewitness identification testimony is an evidentiary matter like any other. States have developed rules and

procedures for ensuring that such evidence is used fairly, and will continue to do so. Petitioner's attempt to mint a novel due process interest in the reliability of all such evidence would simply sweep these state efforts away. Because the Due Process Clause does not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure," *Spencer*, 385 U.S. at 564, the Court should reject Petitioner's argument.

CONCLUSION

The Court should affirm the judgment of the New Hampshire Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

NEW HAMPSHIRE,

Respondent.

On Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys and their clients to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. Founded in 1958, NACDL has more than 12,500 members nationwide – joined by ninety state, local, and international affiliate organizations with another 35,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America's criminal justice system.

SUMMARY OF ARGUMENT

The New Hampshire courts deprived Petitioner of due process when, based solely on the absence of improper state action, they categorically refused to consider whether the suggestive circumstances of his

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3(a).

pre-trial identification created a very substantial likelihood of misidentification. Due process is concerned with the fairness and integrity of judicial proceedings and, in furtherance of that concern, requires special attention to certain limited categories of cases where the risk of an erroneous conviction is especially acute. Suggestive identifications, regardless of the cause of the suggestiveness, are one of those limited categories: experience shows that they present a particularly grave danger of producing an unfair trial. In such cases, a *per se* rule that precludes judicial scrutiny of the risk of misidentification before evidence of the identification is admitted, based solely on the presence of a single circumstance – the presence or absence of improper state action – rather than the Court-mandated analysis of the totality of the circumstances, cannot comport with due process. Improper state action does not necessarily have a greater impact on the reliability of the identification than any other factor, and "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1976).

As discussed in Point I, suggestiveness may imperil the reliability of an identification regardless of whether it arises from improper state action or another source. A suggestive identification is one in which the circumstances surrounding the identification prompt the witness to conclude that "this is the man" – that the individual being viewed is the one who committed the crime. Identifications made under

such circumstances present a heightened risk of unreliability for at least three reasons. First, witnesses who make identifications under suggestive circumstances are apt to remember the face they are seeing at the time of the identification as the face of the person who committed the crime. Second, they are likely to become hardened in their conviction that they identified the right person and their level of certainty may increase. Third, as a result, it is difficult to cross-examine such witnesses effectively and expose the insidious and often subtle effects of the suggestiveness. The rule this Court previously developed requiring suggestive identifications to be examined for reliability is designed to ensure that unreliable identifications do not reach the jury and fatally undermine the fairness of the trial.

Given that the core objective of the due process protections is to avoid erroneous deprivations of life and liberty at trial, not to regulate state conduct outside the courtroom and before trial, the New Hampshire Supreme Court's rule is ill-designed to advance that end. Suggestive identifications caused by inadvertent state action (as was the case with Petitioner) or by other factors (such as the media or a private investigator) may be equally or even more suggestive than those caused by improper or unnecessary state action and create all the same risks to the integrity of the fact-finding process. While the Court first developed this analysis in cases where the suggestiveness of the identification was the result of deliberate, or at least unnecessary, choices made by

law enforcement – who are ordinarily responsible for identifying the perpetrator – that factor should not be dispositive to the reliability analysis.

As shown in Point II, suggestive identifications are just one of a number of contexts where conditions present a heightened risk of erroneous fact-finding at trial and where, therefore, due process requires measures to protect the integrity of that process. Other examples include cases involving substantial pre-trial publicity unfavorable to the defendant, and cases involving communications with jurors outside the courtroom concerning the subject matter of the trial. In such cases, the issue is whether the jurors will be able to reach their verdict solely on the basis of the competent evidence and arguments presented at trial. Due process requires that jurors be protected from external influences that may impair that ability, regardless of whether private or public actors are responsible for those influences. Exactly the same considerations should apply here.

ARGUMENT

I. THE DUE PROCESS CLAUSE'S PROTECTIONS AGAINST SUGGESTIVE IDENTIFICATIONS SHOULD NOT DEPEND ON WHETHER THE SUGGESTIVENESS WAS THE RESULT OF IMPROPER STATE ACTION

It is elementary that the "function of legal process, as that concept is embodied in the Constitution,

and in the realm of factfinding, is to minimize the risk of erroneous decisions" and that the "quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Heller v. Doe*, 509 U.S. 312, 332 (1993) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979)). The need to minimize the risk of error is never more acute than in criminal trials, where the defendant's liberty interest is "almost uniquely compelling." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) (adding that "the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern"). Due process safeguards exist in large part to "enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81. In sum, a central focus of due process is to protect the integrity of the fact-finding process, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citation omitted), and to protect a "criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom," *Estes v. Texas*, 381 U.S. 532, 593 (1965) (Harlan, J., concurring).

In this context, this Court has recognized that "suggestive" identifications present a particularly severe risk of unreliability, and therefore create a special due process concern when they are admitted at trial. Indeed, according to at least one scientific study cited by the Court, "'[t]he influence of improper suggestion upon identifying witnesses probably

accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.'" *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (citing Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (1965)); *see also Brathwaite*, 432 U.S. at 112 (noting that suggestion exacerbates the effect of other circumstances that impair the reliability of identifications). As a result of these concerns, the Court mandated that before a suggestive identification may be admitted, a trial court must assess the particular reliability of the identification in the totality of the circumstances. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972).

While this Court has never precisely defined what makes an identification "suggestive," its usage in the seminal eyewitness identification cases shows that the term refers to circumstances that prompt the witness to infer "that's the man" – *i.e.*, that the person she is viewing committed the crime. *See Wade*, 388 U.S. at 236 (observing that the "accused's fate" may be determined, not in the courtroom, but at the suggestive pre-trial confrontation that causes the witness to say "that's the man"). This definition accords with ordinary usage and with references to "suggestion" by this Court in other contexts and by other courts in identification cases.[2]

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[2] *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) ("studies show that children are substantially more vulnerable to suggestion than adults," with potential

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The potential for suggestiveness arises because there are three stages to an identification: an initial act of witnessing the crime; a subsequent pre-trial viewing of the defendant, who may or may not be the same person seen committing the crime; and the admission of identification evidence at trial, either of the pre-trial identification or an in-court identification (or both). When the middle stage is suggestive, it can lead to several types of concerns about the resulting identification evidence.

First, when the circumstances of the later viewing themselves convey the suggestion or inference that the individual is the perpetrator, it has the power to alter the witness's memory from the initial stage in a way that renders his subsequent identification inaccurate. This Court has specifically recognized the danger that a witness exposed to a suggestive viewing may unconsciously transfer his memory of

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impairment of the reliability of their testimony); *Rock v. Arkansas*, 483 U.S. 44, 60-61 (1987) (discussing measures courts may take to diminish the impact of "suggestion" on the accuracy of hypnotically-refreshed testimony); *Thigpen v. Cory*, 804 F.2d 893, 896 (6th Cir. 1986) (an "individual's appearance in a line-up suggests to a witness that the person is in police custody for some reason" and "is likely to associate that person with the crime to some degree in the witness' mind"); *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980) (risk of "suggestiveness" is diminished when circumstances do not give the witness any "indication . . . that 'this is the man'"); *see also* Webster's II New College Dictionary (1995), at 1103 (defining "suggestive" as "[t]ending to suggest thoughts or ideas" or "[c]onveying a suggestion or hint: indicative").

the defendant's face from the suggestive identification onto his memory of the face of the perpetrator, increasing the risk of a subsequent misidentification. *See Simmons v. United States*, 390 U.S. 377, 383-84 (1968) (noting, after describing several hypothetical circumstances that were suggestive, that "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification") (footnote and citation omitted).

Second, suggestive circumstances influence a witness's views concerning an identification. They may harden the witness's conclusion that the defendant is the perpetrator. *See, e.g., Wade*, 388 U.S. at 229 ("'[i]t is a matter of common experience that, once a witness has picked out the accused . . . , he is not likely to go back on his word later on. . . .'") (footnote and citation omitted). They also may inflate a witness's certainty concerning an identification, even when that identification is incorrect.

Finally, the insidious effect of suggestiveness is difficult to expose through the usual tools available to the defense at trial, such as cross-examination. Even if the cross-examiner is aware of all the suggestive circumstances that were present and is able to question the witness in a way that draws those circumstances out, it is difficult for a jury to evaluate the typically subtle effects of suggestiveness, particularly

when the witness comes across as credible because she truly believes, incorrectly, that the person she identified is the perpetrator. *Watkins v. Sowders*, 449 U.S. 341, 356-57 (1981) (Brennan, J., dissenting) (explaining that cross-examination cannot protect the accused in suggestive identification circumstances because "the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination").

Serious as these concerns were when the Court first recognized them, they are even more grave today given the accumulation of research that documents the extreme risk of misidentification and the concomitant risk of erroneous deprivation of life and liberty arising from suggestive identifications. *See* Petr. Br. at 17-22; Amicus Br. of Innocence Network at 11-14. These more recent studies confirm that there is a heightened risk that a jury will not properly weigh the reliability of identification evidence that has potentially been influenced by suggestive circumstances surrounding the identification.

The New Hampshire Supreme Court's test, which focuses on whether the suggestiveness of an identification arose from "improper state action," artificially curtails the due process inquiry. JA 10a (citing *State v. Addison*, 160 N.H. 792, 801 (Oct. 19, 2010)); *see also id.* at 9a (citing *Addison*, 160 N.H. at 800 (stating that the first step is to determine "whether the identification procedure was impermissibly or unnecessarily suggestive") and citing *State v. King*, 156 N.H. 371, 374 (2007)). It does not address the core due process concern of reliability; it leads to

inconsistent application; and it does not fit the nature of the rights at stake.

To begin with, none of the dangers associated with suggestive identifications turn on the existence of improper state action – or state action at all, for that matter. While this Court made its seminal pronouncements on suggestive identifications in cases where the suggestiveness arose directly from the identification procedures employed by the police, that was surely a reflection of the typical factual scenario,[3] not the internal logic of the doctrine. After all, the reliability of the identification itself – which is the "linchpin in determining the admissibility of identification testimony," *Brathwaite*, 432 U.S. at 114 – has nothing to do with whether the suggestiveness derives from actions of law enforcement or not. *See Simmons*, 390 U.S. at 383-84 (suggestive identifications potentially reduce the reliability of trial testimony "[r]egardless of how the initial misidentification comes about"); *see also* O. Raban, On Suggestive and Necessary Identification Procedures, 37 Am. J. Crim. L. 53, 61 (Fall 2009) (after *Biggers* and *Brathwaite*, "whether necessitated by circumstances or completely gratuitous, the Due Process question remained the

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[3] There can be little doubt that identifications orchestrated by law enforcement constitute the vast majority of all pre-trial identifications. After all, it is law enforcement that typically gathers evidence after a crime occurs in order to identify the perpetrators and, as part of that evidence-gathering process, has the power to provide eye witnesses to the crime with a later opportunity to view potential suspects.

same – namely, whether the identification was reliable"). It is difficult to understand, for example, why a private investigator, or a media campaign that saturated a market with images of the defendant identified as the perpetrator of a crime, could not have an equally suggestive influence over a witness as a state-orchestrated line-up.

In particular, the focus on whether any state action was "improper" is utterly irrelevant to the question of whether an identification is suggestive. Here, for example, the scene that the witness viewed was of Petitioner standing next to one of the responding officers in the parking lot where the car was burglarized, after Petitioner was directed to remain with another officer. JA 43a, 48a-49a. In *United States v. Wade*, the witness was inadvertently able to observe the defendant standing in the custody of police officers in a hallway just before the "official" line-up occurred. 388 U.S. at 234. In each of these situations, the "message" being conveyed that the defendant was under suspicion – and even that the police believed he was the perpetrator – may have been *more* powerful than that created by an impermissibly suggestive line-up. When the defendant is already being implicated in the crime, it should make little difference to the *Biggers* analysis or due process whether law enforcement was *trying* to create a suggestive scenario. *See, e.g., Wade*, 388 U.S. at 229 ("[S]uggestion can be created intentionally or unintentionally in many subtle ways.").

An analogous situation arose in *Rock v. Arkansas*, 483 U.S. 44 (1987), which considered a defendant's due process challenge to a state law that categorically prohibited her from introducing her own hypnotically-refreshed testimony in her criminal trial. The Court acknowledged that the subjects of hypnotic treatment are prone to suggestion (and, in addition, may undergo "'memory hardening,' which gives [them] great confidence in both true and false memories, making effective cross-examination more difficult"), such that state statutes barring or limiting such testimony are aimed at protecting a legitimate interest in the reliability of the evidence at trial. *Id.* at 60. Nevertheless, the Court concluded that the prohibition adopted by the State of Arkansas was unduly broad and arbitrary, since not all such testimony is unreliable. *Id.* at 60-61. The Court concluded that reliability must be judged in the individual case based on all the traditional factors.[4] Thus, in the context of evidence

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[4] As this example suggests, many procedural and evidentiary rules function as a hedge to avoid a due process violation: if applied vigilantly, they protect the trial from being tainted by the introduction of evidence so unreliable that it offends due process. Another example is the requirement that the trial court serve as a gatekeeper testing the reliability of proposed expert evidence. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-91 (1993) (trial judges must ensure reliability of expert testimony). Amicus submits that if the Rules of Evidence did not require courts to exclude sufficiently unreliable expert evidence, at a certain threshold due process would require such exclusion. Indeed, the Court made a similar observation in the confrontation clause context in *Bruton v. United States*, 391 U.S. 123, 136 n.12 (1968), where it observed that

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procured by suggestive means, *Rock* shows that courts must apply procedures that balance the need to screen out potentially unreliable evidence against the possibility that the evidence at issue may be reliable despite its suggestiveness; that this screening cannot be done with sweeping, mechanically-applied rules; and, most significantly for the instant case, that the same dangers of unreliable suggestiveness can be equally present whether or not a state actor is responsible.

Finally, as Petitioner explains, whether there was any improper state action speaks to the wrong issue. *See* Petr. Br. at 23-27. The focus of the due process analysis is the reliability of the evidence presented at trial, not the deterrence of inappropriate police conduct. The conducting of even an intentionally suggestive identification procedure, by itself, does not result in a constitutional violation. *See Brathwaite*, 432 U.S. at 113 n.13 ("Unlike a warrantless search, a suggestive pre-indictment identification does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem.").[5] Rather, it is the admission

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"the reason for excluding this evidence [the confession of the petitioner's co-defendant] as an *evidentiary* matter also requires its exclusion as a *constitutional* matter" (emphasis in original).

[5] It is for this reason that any reliance on *Colorado v. Connelly*, 479 U.S. 157 (1986), is misguided, as persuasively explained in Petitioner's brief at 29-33.

into evidence of a suggestive and unreliable identification that constitutes the violation. *Id.* at 112 (holding that the "concern" is "that the jury not hear eyewitness testimony unless that evidence has aspects of reliability").

The New Hampshire Supreme Court's rule fails to comport with due process because (i) it does not make reliability the linchpin in determining the admissibility of the identification evidence, and (ii) it does not require the trial court to consider the totality of the circumstances or weigh the effect of the suggestiveness against the reliability of the identification. *See Brathwaite*, 432 U.S. at 114. All of the factors bearing on the reliability of the suggestive identification drop out of the New Hampshire Supreme Court's analysis because it elevates a single consideration – whether "improper state action" was present – as a prerequisite for any further due process protection. That procedure is incompatible with this Court's prior rulings, the policies behind those rulings, and logic.

Furthermore, there should be no concern that applying a *Biggers* analysis to non-state-orchestrated identifications will prove overly burdensome to trial courts. Far from opening the flood gates, Amicus submits that the cases where suggestiveness arises independently of any state action (*e.g.*, pre-trial publicity) or as a result of inadvertent state action (as is the situation with respect to Petitioner) will be few and far between. It is also important to consider that the rule Petitioner is requesting – requiring trial courts to perform the *Biggers* analysis in the uncommon

circumstance of a suggestive identification that was not caused by improper state action – is a relatively simple exercise in a discrete and limited number of cases. The rule would not result in the *per se* exclusion of a category of evidence, or even mandate a pretrial reliability hearing. Rather, the trial court would merely need to assess, before identifications that are shown to be made under suggestive circumstances are admitted into evidence, whether such identifications are so unreliable as to create "'a very substantial likelihood of irreparable misidentification.'" *Biggers*, 409 U.S. at 197 (quoting *Simmons*, 390 U.S. at 384).

II. IN OTHER CIRCUMSTANCES WHERE THE RELIABILITY OF THE FACT-FINDING PROCESS IS AT HEIGHTENED RISK, THIS COURT HAS IMPOSED DUE PROCESS SAFEGUARDS WITHOUT REGARD TO WHETHER THE RISK IS CAUSED BY IMPROPER STATE ACTION

This Court has recognized a variety of other circumstances that pose a risk to the integrity of the fact-finding process and the reliability of the evidence presented to the jury. In each of these circumstances, it has fashioned rules in the name of due process designed to prevent the tainting of the jury with prejudicial information or evidence that is unreliable or incompetent. *See Bruton v. United States*, 391 U.S. 123, 132 n.6 (1968) ("An important element of a fair

trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence."). In none of these contexts, however, has the due process analysis turned on the existence of improper state action.

For example, in cases involving prejudicial pretrial publicity, the key factor the Court has considered is whether the *effect* of the publicity has so contaminated the jury that it can no longer fairly and impartially consider the evidence of guilt or innocence. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (considering whether there is a reasonable likelihood that prejudicial news prior to trial prevented a fair trial); *Estes*, 381 U.S. at 546-47; *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). The test is whether the jury's verdict "will be induced only by evidence and argument in open court, and not by *any* outside influence, whether of private talk or public print." *Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896, 2913 (2010) (emphasis supplied) (citing *Patterson v. Colorado ex rel. Att'y Gen. of Colo.*, 205 U.S. 454, 462 (1907)). The *causes* of the publicity are beside the point; the issue is the impact the publicity will have on the jury.

For example, in *Rideau*, although the prejudicial publicity (the broadcast of an interview with the defendant on local television) was carried out with the active cooperation and participation of local law enforcement officers, the Court expressly held that "the question of who originally initiated the idea of

the televised interview is, in any event, a basically irrelevant detail." 373 U.S. at 726. What was relevant was that for members of the local venire pool, the televised "spectacle" of the interview to which they were pervasively exposed made fair and objective consideration of the evidence presented at trial impossible.

Similarly, in *Estes*, where the Court criticized the use of cameras in the courtroom during a criminal trial on due process grounds, one of the key reasons was the probable detrimental effect on the quality of witness testimony. In language highly reminiscent of its analysis of suggestiveness in the identification cases, the Court noted that the impact on a witness of knowing he is being viewed by a vast audience is that "memories may falter," "accuracy of statement may be severely undermined," and a "natural tendency toward overdramatization" may occur. 381 U.S. at 546; *see also id.* at 591 (Harlan, J., concurring) (describing how, under the glare of intense public interest, the "timid" witness may become more timid, and the "cocky" witness more cocky). These possibilities were viewed as carrying "grave potentialities" for casting doubt on the integrity of the fact-finding process. *Id.* at 592. Again, the baleful effect of media coverage did not derive from any state action, proper or improper.

Due process also bars communications with jurors made in circumstances that may influence their impartiality, regardless of whether such communications arise from improper state action. For

example, in *Remmer v. United States*, 347 U.S. 227, 229 (1954), the Court held that "[i]n a criminal case, any private communication . . . , directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." The analysis does not depend on whether the jury became tainted due to the conduct of public or private actors. The due process protections were aimed at ensuring that the jury would be able to do its job fairly, regardless of the cause of the taint. Due process has exactly the same aim here.

Even when the influence that taints the jury's deliberations *is* caused by improper state action, the Court has made clear that the origin of the taint is not the core due process concern. For instance, in *Turner v. Louisiana*, 379 U.S. 466, 468 (1965), two deputy sheriffs who were the two principal witnesses for the prosecution were in "close and continual association" with the jurors during the trial. In overturning the conviction on due process grounds, the Court noted that "[i]t would have undermined the basic guarantees of trial by jury to permit this kind of association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs." *Id.* at 474 (emphasis in original). The point was that "minimal standards of due process" require a verdict to be based upon the evidence developed at the trial, *id.* at 472-73, not impressions of witness credibility that the jurors developed outside the trial. The due process protections, therefore, are the same regardless of

whether the persons who had improper contacts with the jury are state actors.[6]

In short – and in contrast to the premise of the New Hampshire rule at issue in this case – in various situations where there is a heightened risk of unfairness at trial, due process requires measures sensitively designed to ensure the quality of the fact-finding at trial, not to regulate state conduct before trial.

---

[6] The imperative to ensure that jurors decide cases based on reliable and competent evidence, rather than other, external factors, similarly motivates the Court's due process decisions curtailing the practice of making defendants appear at trial in shackles. In *Deck v. Missouri*, 544 U.S. 622, 629 (2005), the Court held that due process "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination . . . that they are justified by a state interest specific to a particular trial." Among the principles underlying this holding is the recognition that "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id.* at 630; *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant"); *see Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (noting, in holding that due process prohibits requiring defendants to be tried wearing prison clothes, that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment" and is "likely to be a continuing influence throughout the trial"). Although these considerations may in a specific case yield to countervailing interests such as security, it is clear that the trial court must undergo an assessment of the relevant circumstances to determine whether the state's need is great enough to overcome the interest in an untainted jury. *See Deck*, 544 U.S. at 629, 634-35.

CONCLUSION

For all the foregoing reasons, the Court should vacate the decision of the New Hampshire Supreme Court and remand the case for proceedings consistent with a holding that the due process clause does not require a criminal defendant to show improper state action by the police in order to challenge the admissibility of an identification arising from suggestive circumstances.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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2 Edward Coke, Institutes of the Laws of England, ch. 29..... 9, 10

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INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) is the world's oldest and largest professional organization representing prosecutors.[1] Its members—found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors—prosecute criminal violations in every State and territory of the United States. Founded in 1950, the NDAA has sought to provide local prosecutors with a national perspective on issues that appear and recur in their offices nationwide. The NDAA also advocates at the national level regarding those issues. The NDAA's underlying objective, like that of its individual members, is to see that justice is done under the rule of law.

To that end, the NDAA seeks to advance the criminal justice system by supporting efforts designed to preserve the honor and integrity of America's state and local prosecuting attorneys, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law-enforcement personnel, and other members of the interested public. It is vitally interested in enabling prosecutors to perform their duties to their utmost by most effectively using the limited resources entrusted to them.

---

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* National District Attorneys Association certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

It thus urges legislatures to adopt clear and practicable statutes in defining the duties and responsibilities of prosecutors, and courts to make clear and practicable interpretations in construing and applying statutory or constitutional texts.

The interests of the NDAA and its members are directly implicated by this case. Petitioner asks this Court to dramatically expand a criminal defendant's substantive due process right to exclude eyewitness identification testimony from trial. If the Court accepts that argument, NDAA's members' ability to use eyewitness testimony will be hampered and the courts will be faced with a flood of motions seeking the suppression of this crucial evidence notwithstanding the absence of any misconduct on the part of government officials. Petitioner's novel constitutional theory would, in practice, undermine the administration of justice and needlessly interfere with the NDAA's members' ability to perform the vital functions that the public has entrusted to their offices.

INTRODUCTION

The question presented by this case is whether the Fourteenth Amendment's Due Process Clause requires the exclusion from a criminal trial of "unreliable" eyewitness identification evidence even though it was not procured through "improper state action." Pet. Br. at i. That question accepts the premise that criminal defendants have a substantive "due process" right to "fundamental fairness" independent of the protections afforded by the Bill of Rights. *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). As a matter of first principles, however, that premise is flawed.

Neither the Due Process Clause of the Fourteenth Amendment nor its Fifth Amendment counterpart created in the Constitution a substantive right to "fairness" under the rubric of due process. The right to "due process" is the right to a trial in accordance with the "law of the land" as that phrase was first used in the Magna Carta. *Murray's Lessee v. The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). It includes the right to notice, an opportunity to be heard, and a trial in compliance with the laws as promulgated by the legislature. *See In re Winship*, 397 U.S. 358, 378-86 (1970) (Black, J., dissenting). But the Due Process Clause is not "a secret repository of substantive guarantees against 'unfairness'" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting).

As a consequence, this Court's holding that the Due Process Clause requires the exclusion from a criminal trial of eyewitness identification testimony that the government obtained under conditions "so unnecessarily suggestive and conducive to irreparable mistaken identification" that it cannot be considered reliable based on the "totality of the circumstances," *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972), lacks constitutional foundation. Not only does this rule mistakenly depend on the heritage of substantive due process, but it relies on a judge's notion of fairness under the particular circumstances of a case to make the legal determination. The Constitution does not empower judges to engage in a freewheeling inquiry of a given case's circumstances to determine whether the defendant has been treated fairly. Whether eyewitness identification testimony is sufficiently reliable to warrant conviction "is not a question for the Court but for the jury, and does not raise a due process issue." *Simmons v. United States*,

390 U.S. 377, 395 (1968) (Black, J., dissenting); *see also Stovall v. Denno*, 388 U.S. 293, 305-06 (1967) (Black, J., dissenting); *Foster v. California*, 394 U.S. 440, 447 (1969) (Black, J., dissenting).

In an appropriate case, the Court should reconsider this line of decisions. At a bare minimum, however, the Court should reject Petitioner's request to radically expand the scope of this suspect constitutional rule by divorcing it from the improper state-action requirement. As its text makes plain, the Fourteenth Amendment is directed at the State—not private individuals. *See NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). In evaluating whether a conviction has been unconstitutionally obtained, the Court's first question therefore must be (and has always been) whether the State engaged in misconduct so egregious that it rises to the level of a due process violation. *See Lisenba*, 314 U.S. at 237; *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935). *Stovall* and its progeny follow directly from this reasoning: these decisions hold that it may be fundamentally unfair, and thus a due process violation, to allow the government to profit from eyewitness identification testimony that it improperly secured. *See* Resp. Br. at 28-43.

Only *after* determining that the government acted improperly has the Court then considered whether to exclude the evidence from trial; it is at that juncture that the Court has taken into account the "reliability" of the eyewitness identification testimony evidence under the "totality of the circumstances." *Manson v. Braithwaite*, 432 U.S. 98, 113-14 (1977). Thus, Petitioner's contention that reliability—and not improper state action—has been the centerpiece of this doctrine—is misleading. Time and again, this Court has explained that in the absence

of a finding of government misconduct, there is no due process violation; the alleged unreliability of evidence, standing alone, is not a substitute for that finding. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Petitioner thus does not seek to vindicate his substantive due process rights; he seeks the wholesale creation of a new one from which he would like to benefit. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). This case is not an occasion to depart from that sensible tradition.

Indeed, there are especially strong reasons here to resist Petitioner's request to create a new substantive due process right. The Constitution, principally through the Sixth Amendment, already guarantees that criminal trials are conducted fairly and that the defendant is permitted to test the reliability of the prosecution's evidence. *See, e.g., Washington v. Texas*, 388 U.S. 14, 18 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968); *Nix v. Williams*, 467 U.S. 431, 446 (1984); *Crawford v. Washington*, 541 U.S. 36, 55-62 (2004). Evidentiary law also provides measurable protection against the use of questionable eyewitness testimony to unfairly secure a conviction. *See, e.g.*, Fed. R. Evid. 403; N.H. R. Evid. 403. And should these constitutional and statutory protections prove insufficient, Congress and the States are fully capable of filling the void legislatively. Given these ample protections, there is no justification—constitutional or otherwise—for transferring oversight from the legislatures to the judiciary. *See, e.g., District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009).

Moreover, adopting Petitioner's novel rule would not serve one of the principal constitutional justifications for excluding evidence from a criminal trial: deterrence. There is no deterrent effect from a rule that is divorced from the requirement of improper state action as exclusion of eyewitness identification evidence obtained without state misconduct would have no influence on police behavior. And, in any event, this Court has wisely found that, absent constitutional necessity, the jury is better equipped to weigh and evaluate evidence than a judge. Indeed, with the benefit of collective wisdom, and especially when guided by sound instructions from the trial court, juries are best positioned to resolve reliability issues. As this Court has remarked, "evidence with some element of untrustworthiness is customary grist for the jury mill." *Brathwaite*, 432 U.S. at 116.

In sum, the rule Petitioner's urges would expand the Due Process Clause far beyond its original meaning and create an entirely new substantive due process right without a constitutional or policy justification for doing so. Accordingly, Petitioner's novel claims should be rejected, and the decision of the New Hampshire Supreme Court should be affirmed.

ARGUMENT

I. THE NEW HAMPSHIRE SUPREME COURT CORRECTLY HELD THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

A. The Court Has Misinterpreted The Due Process Clause To Limit The Use Of Eyewitness Identification Testimony During Criminal Trials.

This Court has held that "[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba*, 314 U.S. at 236. Applying this rule, the Court has further held that the Constitution requires the exclusion from trial of eyewitness identification testimony where the "totality of the circumstances" shows that the government procured it under conditions "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the criminal defendant] was denied due process of law." *Stovall*, 388 U.S. at 301-02. Both the background constitutional rule and its application to this setting are mistaken as a matter of first principles.

The Fourteenth Amendment provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. By this amendment, the Constitution required the States to afford to the People the same "due process" rights that the Fifth Amendment already demanded of the national government. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *Hurtado v. California*, 110 U.S. 516, 534-35 (1884); Raoul Berger, *Government by Judiciary:*

The Transformation of the Fourteenth Amendment 200-03 (1977). As an original matter, then, the established phrase "due process of law" could bear only one meaning: the public understanding of it at the time of the Fifth Amendment's ratification. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring in part and concurring in the judgment).

At that time, there was broad consensus that the right to "due process of law" was synonymous with the Magna Carta's promise of a trial according to the "law of the land."[2] *Murray's Lessee*, 59 U.S. (18 How.) at 276 ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta."). English Parliament used the terms interchangeably as far back as the Fourteenth Century. *Compare* 25 Edw. 3, stat. 5, c. IV ("Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land."), *with* 28 Edw. 3, c. III ("That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.").

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2. The Magna Carta provides: "No Freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any otherwise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land." 1 William Penn & William Bradford, The Excellent Priviledge of Liberty and Property 32-33 (1897) (citation omitted) (translating the Magna Carta).

Lord Edward Coke thus concluded that, under English common law, "due process of law" referred to the same rights and protections as the "law of the land." 2 Edward Coke, Institutes of the Laws of England ch. 29, at 50; *see also Murray's Lessee*, 59 U.S. (18 How.) at 276.

This common understanding of "due process of law" extended to the Colonies; indeed, it formed part of the basis for the break from England. *See* Rodney L. Mott, Due Process of Law § 51, at 133-34 (1926) ("The colonists rested their case on the fundamental rights of Englishmen according to the British Constitution ... and looked upon the protections of the Great Charter as one of its chief parts, the cornerstone of which was the 'law of the land' article."). And it was later included in many of the state constitutions in the aftermath of the Revolutionary War. *See* Md. Const. Declaration of Rights § 21 (1776) ("[N]o freeman ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges ... but by the judgment of his peers, or by the law of the land."); N.C. Const. Declaration of Rights art. 12 (1776) ("That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled ... or deprived of his life, liberty, or property, but by the law of the land."); N.Y. Const. art. 13 (1777) ("[T]his convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers."); Va. Declaration of Rights § 8 (1776) ("[T]hat no man be deprived of his liberty, except by the law of the land or the judgment of his peers."). The United States, in Congress assembled under the Articles

of Confederation, also drew from the Magna Carta in drafting Article 2 of the Northwest Ordinance, which provided that "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land."

At the time of the Fifth Amendment's ratification, therefore, both its drafters and the public understood "due process of law" to bear the same meaning as "law of the land" did in England. *See* Berger, *supra*, at 194 ("No statement to the contrary will be found in any of the constitutional conventions, in the First Congress, nor in the 1866 debates."); *Stovall*, 388 U.S. at 305 (Black, J., dissenting) ("No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended [a different interpretation of the Due Process Clause].").

Importantly, this right to trial in accordance with "the law of the land" or "due process of law" imposed only procedural limits on the King's authority. *See* 1 William Blackstone, Commentaries 137-38 ("The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law."). In other words, "due process of law" required that "[n]o man be put to answer without presentment before justices, or thing of record, or by due proces[s], or by writ original[], according to the old law of the land." 2 Coke, *supra*, at 50. But it did not dictate the substance of the legal protections that the criminal justice system must afford to the accused. Parliament retained the sole authority to articulate the "law of the land" and, in turn, "justice is directed to be done according to the law of the land: and what that law is, every subject

knows; or may know if he pleases: for it depends not on the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament." 1 Blackstone, *supra*, at 137.

The scope of due process under our Constitution is the same. *See* 9 The Papers of Alexander Hamilton 35 (H.C. Syrett & J. E. Cooke eds., 1962) ("Lord Coke ... in his comment upon a similar clause in [the] Magna Charta, interprets the law of the land to mean presentment and indictment.... The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature."). Indeed, given the phrase's settled meaning, it should come as no surprise that the Fourteenth Amendment's framers do not appear to have debated the issue: "The lawyers who framed the Fourteenth Amendment undoubtedly were familiar with this association of due process with judicial procedure." Berger, *supra*, at 200. In light of its evident procedural focus, the right to "due process of law" thus entitled criminal defendants to notice, an opportunity to be heard, *see In re Oliver*, 333 U.S. 257, 273 (1948), and, most importantly for present purposes, a trial "according to written constitutional and statutory provisions as interpreted by court decisions," *In re Winship*, 397 U.S. at 382 (Black, J., dissenting); *see also Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 337 (Tex. Civ. App. 1959) ("The term 'due process of law' is synonymous with 'the law of the land,' and its essential elements are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.").

It does not entitle them, however, to any particular set of procedures or special protection against unfair trials. *See Rogers v. Peck*, 199 U.S. 425, 435 (1905) ("Due process of law ... does not require the state to adopt a particular form of procedure."); *Hurtado*, 110 U.S. at 535 ("Due process of law ... [i]n the Fourteenth Amendment ... refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state."). To be sure, the Due Process Clause ensures "that our governments are governments of law and constitutionally bound to act only according to law." *In re Winship*, 397 U.S. at 382 (Black, J., dissenting). But it neither dictates the substance of those laws nor empowers judges to shape criminal trials to meet their peculiar sense of fundamental fairness. *See BMW*, 517 U.S. at 598-99 (Scalia, J., dissenting).

The Court's introduction of this substantive fairness requirement betrays not only the amendment's text and history, it turns a noble contribution into "an oxymoron." *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment). "When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.'" *In re Winship*, 397 U.S. at 384 (Black, J., dissenting). In other words, it is the judicially-fashioned notion of substantive due process—and not its absence from constitutional doctrine—that is at war with "the concept of ordered liberty." *Palko v. Connecticut*,

302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).[3]

The line of decisions at issue here illustrate the problem. Not only do they use substantive due process as a governor on the admissibility of evidence, but each inappropriately looks to the "'totality of the circumstances' of a particular case to determine ... whether they comport with the Court's notion of decency, fairness, and fundamental justice, and, if not, declares they are forbidden by the Constitution." *Stovall*, 383 U.S. at 305 (Black, J., dissenting). The Constitution does not vest the judiciary with "wideranging, uncontrollable power" to compel procedures that meet their subjective standard for "fairness" according to the "totality of the circumstances" in a particular case. *Simmons*, 390 U.S. at 395 (Black, J., dissenting). As Justice Black explained, "[s]uch a constitutional formula substitutes this Court's judgment

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3. The fact that the Due Process Clause does not have an independent substantive component does not necessarily resolve whether it requires the States to abide other amendments to the Constitution. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-471 (1993) ("I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*–era cases the plurality relies upon.") (Scalia, J., concurring in the judgment); *compare McDonald*, 130 S. Ct. at 3058-88 (Thomas, J., concurring in part and concurring in the judgment), *with Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

of what is right for what the Constitution declares shall be the supreme law of the land." *Stovall*, 383 U.S. at 305 (Black, J., dissenting). "A trial according to due process of law is a trial according to the 'law of the land'—the law as enacted by the Constitution or the Legislative Branch of Government, and not 'laws' formulated by the courts according to the 'totality of the circumstances.'" *Simmons*, 390 U.S. at 396 (Black, J. dissenting).

As a result, the prosecution's use of eyewitness identification testimony does not raise a due process issue. Whether the government procured eyewitness evidence in an "unfair" manner does not deprive the defendant of his constitutional right to notice, an opportunity to be heard, or trial in accordance with extant law. And whether these "unfair" circumstances make the evidence "unreliable" adds nothing to the constitutional inquiry. That the issue involves the reliability of evidence indicates that, if anything, the Framers anticipated that it would be resolved by the jury—not judges. *See Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 51 (1837) (explaining that it is the jury's "province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere."); *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) ("[I]t is the jury to whom we have entrusted the responsibility for making [determinations of truth] in serious criminal cases." (citation omitted)); *see also Foster*, 394 U.S. at 447 (Black, J., dissenting) ("[I]t is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts."). Relying on "unreliable" eyewitness evidence in attempt to secure a conviction does not violate the criminal defendant's

due process rights; it instead goes to the "weight of the testimony given by the identifying witnesses." *Simmons*, 390 U.S. at 395 (Black, J., dissenting).

By converting this issue into a question for the judge, this rule thus interferes with the jury's function under our constitutional plan. *See Foster*, 394 U.S. at 447 (Black, J., dissenting) ("[T]he jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth."). Indeed, this Court has recognized the fundamental nature of the right to a jury trial in criminal cases, *see Duncan*, 391 U.S. at 149-53, and has emphasized the essential protections that juries provide to criminal defendants, *see id.* at 151-53; *see also Williams v. Florida*, 399 U.S. 78, 87 (1970) ("[H]istory reveal[s] a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement."). The underlying rule reduces the fact-finding power of the jury and "rob[s] [the jury] of the responsibility to perform the precise functions the Founders most wanted it to perform." *Foster*, 394 U.S. at 447 (Black, J., dissenting); *see also Ewing's Lessee*, 36 U.S. (11 Pet.) at 51.

"Rules of evidence are designed in the interests of fair trials." *United States v. Augenblick*, 393 U.S. 348, 352 (1969). "[U]nfairness in result," however, "is no sure measure of unconstitutionality." *Id.* The Due Process Clause mandates that criminal trials be conducted according to the rules and procedures set forth in the Constitution and formulated by the responsible legislative body. However, it "leaves to the States and to the people

all these questions concerning the various advantages and disadvantages of admitting certain types of evidence." *Foster*, 394 U.S. at 449 (Black, J., dissenting); *see also Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). The Due Process Clause does not authorize the judiciary to substitute its views of fairness for that of the People.

B. At A Minimum, The Due Process Clause Requires "Improper State Action" Before Eyewitness Identification Evidence Can Be Excluded From A Criminal Trial.

Although this Court has not been asked to revisit the legitimacy of this substantive due process rule here, it should do so in an appropriate case. In light of the rule's weak foundation, however, the Court should not extend it, per Petitioner's request, to bar the admission of "unreliable" eyewitness identification testimony absent improper state action. By its terms, the Fourteenth Amendment provides that "No State shall" violate its command. U.S. Const. amend. XIV, § 1. But it "erects no shield against merely private conduct, however ... wrongful." *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quotation omitted); *see also Tarkanian*, 488 U.S. at 191. This limitation extends fully to the criminal arena. *See Connelly*, 479 U.S. at 165.

Accordingly, when this Court has explained that the Due Process Clause guarantees a criminal defendant "[t]he right to a fair trial," it has been equally clear that this right "imposes on *States* certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions." *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009) (emphasis added and quotation

omitted). Private conduct does not suffice—even "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Connelly*, 479 U.S. at 165. Thus, the first question in any due process challenge to a criminal conviction has always been whether the State engaged in misconduct, i.e., "improper state action" as the New Hampshire Supreme Court described it, App. 10a (quotation omitted); *see, e.g.*, *Connelly*, 479 U.S. at 167 ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"). Absent state misconduct, "there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* at 164; *see also Lisenba*, 314 U.S. at 237 ("If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law."). The necessity of state misconduct fulfills "[t]he aim of the requirement of due process," which "is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba*, 314 U.S. at 236.

The Court's eyewitness identification jurisprudence is not to the contrary. In no case has the Court dispensed with the required element of improper state action. *See, e.g.*, *Manson*, 432 U.S. 98 (unnecessarily suggestive photographic identification); *Biggers*, 409 U.S. 188 (unnecessarily suggestive stationhouse showup); *Foster*, 394 U.S. 440 (lineup where accused was placed with considerably shorter men, followed by repeated showups after no positive identification had been made); *Simmons*,

390 U.S. 377 (affirming the propriety of the FBI's resort to photographic identification); *Stovall*, 388 U.S. 293 (considering propriety of hospital room show-up in which the accused was handcuffed to one of five police officers present and was the only African-American in the room); *Gilbert v. California*, 388 U.S. 263 (1967) (overly suggestive lineup arranged by federal and state officers).

All of these decisions make clear that Petitioner has taken out of context the Court's statement that "reliability is the linchpin" in determining admissibility in a due process challenge. *Brathwaite*, 432 U.S. at 114. Although reliability of the eyewitness identification evidence may ultimately determine admissibility, improper state action is necessary for the Due Process Clause to be implicated in the first place. Improper state action is the necessary link between unreliable eyewitness identification evidence and a due process violation. *See, e.g.*, *Connelly*, 479 U.S. at 165 ("The [Colorado] court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State. The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."). As Petitioner concedes there was no improper state action, the New Hampshire Supreme Court correctly rejected his claim. *See* Resp. Br. at 43-48.

II. THERE IS NO JUSTIFICATION FOR DISPENSING WITH THE "IMPROPER STATE ACTION" REQUIREMENT IN THE CONTEXT OF EYEWITNESS IDENTIFICATION EVIDENCE.

Because the rule urged by Petitioner, which would dispense with the requirement of improper state action, finds no support in the Court's decisions, he effectively argues for the overruling of *Stovall* and its progeny. *See* Resp. Br. at 35. But there is no reason for the Court to fashion a new rule of constitutional law that would eliminate the improper state action element from a due process challenge to eyewitness identification evidence and transform routine questions of reliability into an issue of constitutional magnitude. *See Harker Heights*, 503 U.S. at 125.

First, federal and state law already provide ample safeguards that protect against the admission of unreliable eyewitness identification evidence. Our Constitution wisely constructed an adversarial system containing several "time-tested mechanisms" for ensuring that a criminal verdict is "the product of fair procedure based upon reliable evidence." Resp. Br. at 20-28. The principal protection of evidentiary reliability is the Confrontation Clause, which guarantees that all testimony will be subject to "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Among other protections for the accused, the Constitution also guarantees the right to counsel and the right to trial by jury, both of which serve to ensure that verdicts are based upon reliable evidence. *See Nix*, 467 U.S. at 446 ("The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered

evidence may be tested in cross-examination."); *Herring v. New York*, 422 U.S. 853, 863 n.15 (1975) ("[T]he 'collective judgment' of the jury 'tends to compensate for individual short-comings and furnishes some assurance of a reliable decision.'" (quoting Lewis Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 4 (1966))).

In addition to these constitutional safeguards, federal and state evidentiary rules serve to ensure verdicts based upon reliable evidence. As this Court has explained, reliability "is a matter to be governed by the evidentiary laws of the forum, ... and not by the Due Process Clause of the Fourteenth Amendment." *Connelly*, 479 U.S. at 167 (citation omitted). Consistent with that design, Congress enacted the Federal Rules of Evidence so "that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. Under the Federal Rules, any evidence (including eyewitness identification evidence) "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. The States—including New Hampshire—have similar evidentiary rules. *See* N.H. R. Evid. 403. As a result, there is no need to create a new rule under the Due Process Clause to address the reliability of eyewitness identification evidence obtained without improper state action. Congress and the States have responded to the concern.

Second, deterring state misconduct is the principal rationale for an exclusionary rule, *see Connelly*, 479 U.S. at 166 ("The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." (citing *United States v. Leon*, 468 U.S. 897, 906-913 (1984))), but unlike *Stovall*

and the decisions that followed it, Petitioner's preferred rule would not advance this. After all, where there is no requirement of improper state action, there is no state misconduct to deter. Exclusion of eyewitness identification evidence obtained without state misconduct would have *no* "influence on police behavior." *Brathwaite*, 432 U.S. at 112. To be sure, deterrence is not the only goal of the Court's jurisprudence in this arena; but it nonetheless is an important goal. *Id.* at 111-13 (highlighting the goals of deterrence of police misconduct, the reliability of eyewitness identification evidence and the administration of justice as "interests to be considered and taken into account").

Third, questions of evidentiary reliability are better left to the collective wisdom and common sense of the jury. This Court has so recognized: "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Brathwaite*, 432 U.S. at 116. Rather than invade the province of the jury by excluding what is undoubtedly relevant evidence, a court should employ appropriate jury instructions to assist the jury in making reliability determinations. *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) ("[T]he proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, as the cases before us demonstrate, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence.").

The model criminal jury instructions outlined by the New Hampshire Bar Association (NHBA) offer a good example of how jury instructions assist a jury in resolving the type of reliability question at issue here. The NHBA model instruction on "Identification" is based upon the instruction set forth in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972). *See* N.H. Bar Association, Criminal Jury Instructions, Drafting Committee Version, at 29 nn. 1, 3 (Sept. 2010), *available at* http://www.nhbar.org/uploads/pdf/CJI.pdf. The model instruction explains that "[t]he value of identification testimony depends on the opportunity the witness had to observe the person who committed the crime at the time of the crime and to make a reliable identification later." *Id.* at 29. It then lists several factors that may be considered by the jury in evaluating identification evidence, including:

- "[t]he length of time available for the observation";
- "[t]he distance between the witness and the person observed";
- "[t]he lighting conditions";
- "[t]he witness's degree of attention to the person observed";
- '[t]he accuracy of any prior description of the alleged perpetrator";
- "the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant";

- the fact "that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one that results from the presentation of the defendant alone to the witnesses";

- whether "the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him or her for identification,"; and

- whether there was "any occasion in which the witness failed to make an identification of the defendant."

Id. at 29-30.

Jury instructions like this easily can be modified to fit the facts of a particular case and thus aid the jury in making reliability determinations. Indeed, the factors listed in the NHBA model instruction more than account for the circumstances Petitioner highlighted in arguing that the eyewitness identification in this case was unreliable. *Compare id.* with Pet. Br. at 3-6 (the witness observed the suspect from the "second or third floor" at "approximately 2:30 a.m." when the "parking lot was dark" and "did not provide any details as to the suspect's features, clothing, facial hair, or any other identifying characteristics" and later "was unable to identify anyone" in "a photographic array containing [Petitioner's] picture"; Petitioner "was standing with a uniformed officer in the parking lot where the crime occurred" and "was the only black male on the vicinity"). This illustrates both that the present case is an ordinary case and that there is no need for the new constitutional rule Petitioner urges.

The trial court in fact gave the jury a *Telfaire*-type instruction in this case. App. 399a-401a. And there is no indication that the jury failed to properly consider the evidence and render an appropriate verdict. Indeed, the jury apparently gave some of the State's proffered evidence more weight and some less, as it reached a split verdict, finding Petitioner guilty of theft, but acquitting him of the charge of criminal mischief.[4]

* * *

"By extending constitutional protection to an asserted right or liberty interest," the Court "to a great extent, place[s] the matter outside the arena of public debate and legislative action. [The Court] must therefore exercise the utmost care whenever [it is] asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation and citation omitted). The Court should be especially cautious where, as here, creating such a right would needlessly "thrust the Federal Judiciary into an area previously left to state courts and legislatures." *Osborne*, 129 S. Ct. at 2322 n.4. Courts and legislatures have crafted rules that amply protect criminal defendants from the use of unreliable evidence and the Constitution safeguards their trial rights in myriad other ways. As a result, there is simply no reason to break new constitutional ground

4. Under New Hampshire law, "[a] person is guilty of criminal mischief who, having no right to do so nor any reasonable basis for belief of having such a right, purposely or recklessly damages property of another." N.H. Rev. Stat. § 634:2(I) (2009).

here by creating a new substantive due process right to the exclusion of "unreliable" eyewitness identification evidence. The Court should adhere to its precedent and reject Petitioner's novel constitutional claim.

CONCLUSION

For the reasons set forth herein, the judgment of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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